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EVIDENCE

9. HEARSAY

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INTRODUCTION

The hearsay rule excludes evidence of out-of-court statements when tendered for the purpose of establishing the truth of the matter stated. The common law has traditionally insisted that the person who personally perceived the events in issue should testify to those events under oath in the presence of the trier of fact and opposing party and subject to cross-examination by the adversary litigant. Such evidence has greater probative force than if the events were described by means of evidence of an earlier out of-court report of the person with personal knowledge The threat of a perjury prosecution is bound to enhance the trustworthiness of the witness' testimony as will the solemnity of the courtroom surroundings and the presence of the party against whom the evidence is given; the demeanour of the witness while testifying should also aid the trier of fact in evaluating his evidence.

The origin of the hearsay rule resides in our adversary theory of litigation, which depends on the right of the adversary to cross-examine the witnesses produced by his opponent and thereby test their credibility. A person's description of a past event might be incorrect because of five possible dangers: the danger that the person did not have personal knowledge of the event; the danger that the person did not accurately perceive the event; the danger that the person when he describes the event does not recall an accurate impression of what he perceived; the danger that the language the person uses to convey his recalled impression of the event is ambiguous or misleading; and, the danger that the person describing the event might not be giving a sincere account of his knowledge. (Morgan, *Hearsay Danger and the Application of the Hearsay Concept* (1948), 62 Harv. L. Rev. 177). All of these dangers may be explored by effective cross-examination and the adversary is denied the opportunity of exposing imperfections of perception, memory, communication and sincerity and challenging the person's testimonial qualification of first-hand knowledge if the description is not given at trial by the person with alleged first-hand knowledge of the event but through the testimony of another reporting that person's description.

The foregoing analysis of the basis for the hearsay rule could lead logically to the conclusion that all statements made out-of-court ought to be excluded if tendered for the purpose of establishing the truth of the matter stated. This, however, has never been the law and as many as thirty-one exceptions are presently recognized. In none of these exceptions are there sufficient guarantees of reliability that one can say the adversary is fully protected. Beginning in the 19th century most of the existing exceptions were rationalized on the basis of circumstantial guarantees of trustworthiness attending the making of the statement and unavailability as a witness of the person who made the statement. These rationalizations were made

long after many of the exceptions had been established and were justified on the premise that the purpose of the hearsay rule was to exclude evidence the reliability of which the jury could not adequately evaluate. If the statement were made under conditions which promoted sincerity to a degree that it were felt that the trier of fact could give it appropriate probative value the statement might be received although the adversary was denied the ability to cross-examine and expose possible defects attributable to the other dangers of perception, memory and communication attendant on a description of a past event. The existing hearsay rule with its numerous exceptions is seen then as a product of conflicting theories: the adversary system of litigation and distrust of the ability of the trier of fact to properly evaluate the evidence. No single principle will explain all existing exceptions and judicial refinements of the exceptions over a long period of time have added little to the rule's consistency. Many of the exceptions may be viewed as solely the product of history and the tendency of the courts has been to limit them to the factual contexts out of which they first arose and to see the list of exceptions as fixed. (But see *Ares v. Venner* (1970), S.C.R. 608.) The judicial creation of exceptions indicates the courts belief that hearsay can have definite probative value and ought to be received despite the intrusion on the adversary system but the haphazard and stultified development of the exceptions has produced a highly technical and often mischievous rule badly in need of reform.

The disadvantages of the hearsay rule were well-stated by the English Law Reform Committee in their 13th report, *Hearsay Evidence in Civil Proceedings:* Cmnd. 2694 (1967), p. 18, and repeated by the English Criminal Law Revision Committee in their 11th report, *Evidence in Criminal Cases:* Cmnd. 4991 (1972):

> The rule against hearsay has five disadvantages. First, it results in injustice where a witness who could prove a fact in issue is dead or unavailable to be called; secondly, it adds to the cost of proving facts in issue which are not really in dispute; thirdly, it adds greatly to the technicality of the law of evidence because of its numerous exceptions in addition to those provided in the Evidence Act 1938; fourthly, it deprives the court of material which would be of value in ascertaining the truth; and, fifthly, it often confuses witnesses and prevents them from telling their story in the witness-box in the natural way. These disadvantages have long been recognized. It is high time that they were tackled boldly.

Of course there is a difference of opinion as to the direction reform of the hearsay rule should take. Since the multiple goals of the rules of evidence, such as truth determination, certainty of result, administrative trial efficiency, and fairness to the parties seem to clash most uncompromisingly at the hearsay rule, perhaps these differences of opinion will never be resolved. (See Murray, *The Hearsay Maze: A Glimpse at Some Possible Exits* (1972), 50 C.B. Rev. 1.)

In our attempt to rationalize the rule and its exceptions we have been guided by the principle that first-hand testimony should always be preferred; but if it is the only evidence available or if it were given under circumstances that tend to ensure its reliability or if the declarant is present and subject to cross-examination then hearsay evidence should be admissible.

One result of our attempt at rationalization would be, of course, that the amount of hearsay evidence receivable would be significantly expanded. Two arguments

are likely to be made opposing any expansion of the hearsay rule, even though such evidence may be the only evidence available and may be just as reliable as much of the evidence now received under the present exceptions to the hearsay rule.

First, it might be argued that the jury will be unable to evaluate the worth of this evidence, and might accordingly be misled by it and convict an accused person on the "slender reed" of hearsay evidence. While jurors at the time the hearsay rule emerged may have been illiterate and ignorant, and therefore were in need of mechanical rules to assist them in assessing evidence, jurors today are usually people of experience and education. Certainly they are more sophisticated in weighing evidence and reaching decisions than jurors of 150 years ago. Probably they rely on hearsay evidence in their everyday affairs and distinguish between it and statements that are made in their presence, the foundation about which they can ask questions. As well, of course, if hearsay evidence is particularly unreliable and likely to mislead the jury the trial judge can exclude it; as noted in earlier study papers the Project recognizes the present existence and suggests the codification of the trial judge's discretion to exclude evidence which has trifling probative value in comparison to other dangers attendant on its receipt. In a criminal case if the evidence against the accused consists in the main of a "slender reed" of hearsay the trial judge will grant a motion for directed verdict, or if a jury verdict is based on such evidence it will be reversed on appeal for lack of sufficiency.

We are fortified in our conclusion about the ability of the jury to assess the worth of hearsay evidence by the reasoning and conclusions of the English Criminal Law Revision Committee:

> We disagree strongly with the argument that juries and lay magistrates will be over-impressed by hearsay evidence and too ready to convict or acquit on the strength of it. Anybody with common sense will understand that evidence which cannot be tested by cross-examination may well be less reliable than evidence which can. In any event judges will be in a position to remind juries that the former is the case with hearsay evidence, and sometimes the judge may think it advisable to mention this to the jury at the time which the statement is admitted. On the other hand there is some hearsay evidence which would rightly convince anybody. Moreover, juries may have to consider evidence which is admissible under the present law, and there are other kinds of evidence which they may find it more difficult to evaluate than hearsay evidence — for example, evidence of other misconduct. (Eleventh Report, *Evidence (General):* Cmnd. 4991 (1972).)

Second, the relaxation of the conditions for the admissibility of hearsay might be opposed by the argument that such relaxation will greatly increase the danger of manufactured evidence. This danger is most often of concern in criminal cases where, it is alleged, if the hearsay rule is relaxed it will make it too easy for the accused to introduce false evidence. It is argued that because the accused has so much at stake in a criminal case, and because he only has to raise a reasonable doubt about his guilt, that he will be unscrupulous in the methods he uses to get an acquittal. A relaxation of the hearsay rule would permit him to introduce a false confession of the crime by a person unavailable to give evidence, or to raise an alibi defence by hearsay alone. The difficulty with this argument is that the rules of evidence are too blunt an instrument to protect the court from false evidence. The recent history of the rules of evidence has been largely a movement away from the position that perjury can be prevented by exclusionary rules. Indeed because of

the great need to protect the innocent in criminal cases a strong case can be made for never applying the hearsay rule against the accused. In reaching this conclusion we tend to agree with Professor Morgan:

> If there was ever a time when exclusionary rules prevented perjury, that time has long since passed . . . Given a litigant willing to commit or suborn perjury and counsel ready to encourage or wink at it, no exclusionary rule will deter them . . . By such exclusionary provisions only the honest litigants will be hurt; he alone will be deprived of the benefit of persuasive evidence. No rational procedure will sanction an exclusionary rule supported only by its supposed efficacy to hinder or prevent false testimony. (A.L.I. Model Code of Evidence (1942), p. 4).

POSSIBLE FORMULATION OF PROPOSED LEGISLATION

Section 1. Definitions

(1) Statement

A statement is verbal or non-verbal conduct intended by the declarant to communicate his belief in the existence of a fact.

(2) Hearsay

Hearsay is a statement, other than one made by the declarant while testifying at his trial or hearing, offered in evidence to prove the truth of the statement.

Section 2. Hearsay Rule

Hearsay evidence is not admissible except as provided by section 3 or by any other Act of the Parliament of Canada.

Section 3. Hearsay Exceptions

Evidence of the following is not excluded by the hearsay rule:

(1) Author of Statement Unavailable

Statements made by a person (1) who is dead or is unfit by reason of his bodily or mental condition to attend as a witness or, (2) who is absent from the hearing and the proponent of his statement has been unable to procure his attendance by process or other reasonable means or, (3) who, being present at the hearing and being compellable to give evidence on behalf of the party desiring to give the statement in evidence, refuses to be sworn, provided that the person's inability or refusal to testify is not due to any wrongdoing of the proponent of his statement committed for the purpose of preventing the person from attending or testifying.

(2) Author of Statement Available

Statements made by a person who has been or is to be called as a witness at the trial or hearing unless the statement was made for the purpose of setting out the evidence which that person could be expected to give as a witness in pending or contemplated legal proceedings.

(3) Admissions

A statement offered against a party and which is

(a) the party's own statement,

(b) a statement which the party by his words or other conduct has adopted as his statement or with which, by his words or other conduct, he has agreed,

(c) a statement by a person authorized by the party to make a statement concerning the subject,
(d) a statement by the party's agent or servant concerning a matter within the scope of his agency or employment, made during the continuance of the relationship, or
(e) a statement by a person engaged with the party in common enterprise, if made in pursuance of their common purpose.

(4) Records

(a) A memorandum, report, record, or data compilation, in any form of acts, events, conditions, opinions or diagnoses, made pursuant to a duty at or near the time in the course of a regularly conducted activity.
(b) Where information in respect of a matter is not included in memoranda, reports, records, or data compilations of a regularly conducted activity and the concurrence or existence of such information might reasonably be expected to be there found, the court may upon production of such memoranda, reports, records or data compilations admit the same for the purpose of establishing that fact and may draw the inference that such matter did not occur or exist.
(c) The circumstances of the making of such a memoranda, reports, records, or data compilations, including lack of personal knowledge by the maker, may be shown to affect its weight, but such circumstances do not affect its admissibility.

(5) Learned Treatises

Statements in learned treatises, periodicals, or pamphlets if identified as authoritative by a witness who is expert in the field with which the material is concerned, and any expert in the same field may be asked to explain statements contained therein. If admitted, the statements may be read into evidence but may not be received as exhibits.

(6) Reputation

(a) A person's reputation arising before the controversy among those who know him or would know about him and
(b) Reputation among members of his family by blood, adoption, or marriage, or among his associates, or in the community, concerning a person's birth, adoption, marriage, divorce, death, legitimacy, relationship by blood, adoption, or marriage, ancestry, or other similar fact of his personal or family history and
(c) Reputation in a community, arising before the controversy, as to boundaries of or customs affecting lands in the community, and reputation as to events of general history important to the community or state or nation in which located.

COMMENT

Section 1. Definitions

Subsection 1 (1) Statement

The present hearsay rule excludes not only certain oral and written statements but also might exclude from a trial evidence of a person's conduct if that conduct were intended by the person to be assertive. For example, evidence that a person shook his head in response to a question suffers from the same testimonial dangers discussed above as would a negative oral statement by him in response to the question. Therefore in that situation evidence of his conduct which was intended as a substitute for words should obviously be treated in the same way as evidence of a verbal statement by him.

However a person's conduct may also tend to prove a fact even though it was not intended by the person to be assertive of that fact. For example, a witness may testify, as tending to prove that it was raining at a particular time, that he saw X put up his umbrella. X in most instances would not have intended his conduct to be an assertion that it was raining, but rather he would simply be responding to his perception of his environment.

Whether evidence of non assertive conduct should be classified as hearsay when it is offered to prove the actor's belief in a particular fact as a basis for an inference that the fact believed is true is a difficult question on which the Evidence Project earnestly solicits advice. The classic analysis of the problem appears in *Wright v. Doe d. Tatham* (1837), 112 E. R. 488, where such evidence was classified as hearsay but its identification as hearsay is often difficult and seldom discerned by counsel or judge (compare *Lloyd v. Powell Duffryn,* [1914] A. C. 733).

We concluded that for the purposes of this study paper conduct, whether verbal or non-verbal, which was not intended as a communication should not be classified as hearsay, even though the actor's sincerity, perception and memory cannot be tested by cross-examination. Since there is an absence of intent on the part of the actor to communicate, the dangers arising from insincerity are slight although we recognize that the threshold question of lack of intent may be difficult in some cases (see Finman, *Implied Assertions as Hearsay: Some Criticism of the Uniform Rules of Evidence* (1962), 14 Stan. L. Rev. 682). The proposed legislation is worded in such a way that conduct will be receivable unless the opponent demonstrates that the actor-declarant intended his conduct to be a communication. The dangers of errors in perception and memory will be minimized in the case of non-verbal conduct since the actor will have based his actions, and not simply his words, on the correctness of his belief. While it is clear by our definition that verbal conduct

which was not intended to be communicative, e.g. a man's scream in pain, is excluded from the operation of the proposed hearsay rule, it should also be noted that verbal conduct intended to be communicative is not within the definition if it were not intended to be assertive of the fact sought thereby to be proved (see *Ratten v. R.,* [1972] Cr. App. Rep. 18 (P. C.) and *Lloyd v. Powell Duffryn, supra*). By our proposal conduct not intended to be assertive will be considered as circumstantial evidence of the actor's belief in the existence of the fact sought to be proved with the strength of the inference to be drawn influenced by the probative value of the conduct (see McCormick, *Evidence* (1954), p. 479). The trial judge would be able to exclude evidence of such conduct if he believes that its probative value is outweighed by the danger of undue prejudice.

Subsection 1 (2) Hearsay

Under the definition, as under existing case law, only statements that are offered in evidence to prove the existence of the fact about which the statement was made are classified as hearsay. Only when the statement is offered for such a purpose is the declarant's sincerity, perception, memory, and behaviour of sufficient importance to render misleading a statement made when these elements cannot be tested by cross-examination. Thus evidence of an extra-judicial statement offered for any purpose other than to prove the truth of the matter asserted is not hearsay. Under the recommended legislative definition, as under the present law, the following kinds of statements would not be hearsay statements since they are being offered only to prove the fact that the statement was made: statements that affect the legal rights of the parties; statements that accompany and explain a transaction; statements that are offered to show the knowledge of the hearer; and, statements offered as circumstantial evidence tending to prove the feelings or state of mind of the declarant.

Also our proposed definition of hearsay and the following exceptions make no distinction among first, second or third-hand hearsay. The well-known dangers in transmitting an oral statement, that the statement will not be accurately remembered and reported, may of course, affect the weight to be given to a second-hand hearsay statement. However, as is evident from our over-all approach to the hearsay problem we do not believe the law of evidence should generally concern itself with weight unless the worth of the evidence in question is totally undeterminable. (See Glanville Williams, *The New Proposals in Relation to Double Hearsay and Records,* [1973] Crim. L. Rev. 139.)

Section 3. Hearsay Exceptions

Subsection 3 (1) Declarant Unavailable

Subsection 3 (1) makes a fundamental change in the common law. At common law a statement made by a person who is unavailable to testify at trial is admissible only if it comes within one of the recognized common law exceptions to the hearsay rule. Under this subsection if the declarant is unavailable all relevant statements made by him are admissible.

If the declarant is unavailable, then his hearsay statement is often the best evidence, indeed often the only evidence. None of the reasons traditionally given for

the exclusion of hearsay evidence appear to us to be compelling enough to warrant the absolute exclusion of such evidence. Also we think that it would be impossible to enumerate the circumstances in which the necessity of admitting a statement made by an unavailable witness would outweigh the possible unreliability of the statement. Therefore we concluded that it would be preferable to provide for the reception of all such statements. The testimonial and other dangers discussed above will of course affect the weight to be given to the statement; the effect of these factors in each particular case can be measured with greater accuracy at the time of the reception of the evidence rather than at the time when we would be in effect attempting to diagnose future events.

In England, where in civil cases statements made by an unavailable declarant are admissible under the present law, a similar recommendation has been made the liberalization of the hearsay rule in criminal cases. However it was recommended that the admissibility of such statements should be subject to two restrictions:

1. At a trial on indictment a statement will not be admissible by reason of the impossibility of calling the maker unless the party seeking to give it in evidence has given notice of his intention to do so with particulars of the statement and of the reason why he cannot call the maker. English Criminal Law Revision Committee 11th Report, *Evidence (General):* Cmnd. 4991 (1972), para. 237, 240-242.

2. A statement said to have been made after the accused has been charged, (by a person who is unavailable at trial), will not be admissible at all. English Criminal Law Revision Committee 11th Report, *Evidence (General):* Cmnd. 4991 (1972), paras. 237, 240-242.

Both of these restrictions were recommended by the English Criminal Law Revision committee because of a perceived need to provide for safeguards against the use of manufactured evidence. We decided against providing for such restrictions.

The English Committee recommended the requirement to give notice because they felt that such notice would "enable the other parties to make inquiries as to the identity (and credibility) of the person supposed to have made the statement, as to whether it is really impossible to call him, and as to the contents of the statement". para. 241. We have not here provided for an advance notice requirement since we think it wise to wait for the report of the Criminal Procedure Project on Discovery; we do however welcome suggestions respecting its desirability and practicality in the criminal process.

Also we do not think that the restriction that hearsay statements are inadmissible if made by a person who is unavailable if it were made after the accused has been charged, should be adopted. Throughout our recommendations we have attempted to avoid making evidence inadmissible merely because it might be false. The English Criminal Law Revision Committee was concerned that after he was charged a professional criminal might manufacture exculpatory evidence by having a "witness" make a statement, for instance that he saw someone other than the accused commit the crime, and then conveniently become unavailable to testify at trial. The danger with such a restrictive proposal is of course that it might cause grave injustices. Such a statement might in some cases be a necessary part of the

accused's defence. It seems much more sensible to admit such statements and permit the time they were made and the circumstances under which they were made to go to weight, rather than decide *a priori* that they will all be fabricated.

If this exception is accepted it will be unnecessary to separately codify those common law exceptions that now depend for their admissibility upon the unavailability of the declarant: dying declarations, declarations against interest, declarations in the course of duty, declarations as to public or general rights, declarations as to pedigree, post-testamentary declarations of testators concerning the contents of their wills and testimony given on former occasions.

If this proposal is unacceptable we would appreciate views on an alternative proposal which was also considered. The existing common law exceptions noted, which depend for their receipt on the unavailability of the declarant, would be codified. In addition the trial judge would be empowered to assess, from the opponent's viewpoint, the hearsay dangers of the particular evidence offered and to weigh it against the necessity, from the proponent's viewpoint, in the particular trial; the trial judge would have a discretion to admit hearsay when the dangers are minimized by the conditions surrounding the making of the statement relative to the necessity.

Subsection 3 (2) Author of Statement Available

By the present law previous out-of-court statements of a witness may be received for the purposes of supporting or attacking his credibility but when so received they may not be used as evidence of the truth of the matter stated. We believe this application of the hearsay rule to be an overly stringent one which pays little regard to the reasons underlying the rule and which produces a limiting instruction to the trier of fact on the utility of the statement which instruction is mere verbal ritual, (See Study Paper 3, *Credibility*). The maker of the statement is present as a witness and subject to cross-examination. If he acknowledges that he remembers the matter to which the statement is relevant, cross-examination on the earlier statement and his present testimony is available to expose the dangers which normally reside in hearsay and as noted by Learned Hand, J.:

> If, from all the jury see of the witness, they conclude that what he says now is not the truth, but what he said before, they are nonetheless deciding upon what they see and hear of that person and in court. (*DiCarlo v. U.S.* (1925), 6 F. 2d 364, 368.)

If the witness denies any knowledge of the matter to which the statement speaks then the necessity for the evidence is just as great as if he were unavailable and yet the trier of fact will be in an improved position to evaluate the statement since it will have present before it not only the witness who reports the statement was made but also the person who is reported to have made it; the trier of fact can decide whom to believe.

Under the exception to the hearsay rule proposed in subsection 3 (2) all prior statements made by a person who has been called or is to be called as a witness at the trial will be admissible as substantive evidence, and not only for the limited purpose of attacking or supporting the witness' credibility. The trial judge of course has a discretion to exclude such statements when he determines the probative value to be outweighed by other considerations such as time, prejudice and super-

fluity (See Study Paper No. 3, *Credibility*). Additional reasons for our proposed change are: that the present rule often results in the exclusion of relevant evidence; the proposed rule will protect a party against a turncoat witness; an out-of-court statement made by a witness is often more likely to be reliable than a statement he makes on the witness stand since the out-of-court statement was made when the event was fresher in the mind of the witness, and perhaps made before he has been influenced by the parties or subsequent events; the declarant is present in court and his credibility and the worth of his previous statement can be evaluated by the trier of fact; it is unrealistic to think that the trier of fact can follow an instruction that the statement can only be used to impeach the credibility of the witness and not as substantive evidence; the present rule works against only that party having the burden of proof; the trial judge will always be able to weigh the sufficiency of the evidence and thus will be able to exercise some control over the danger that the jury will give too much weight to a prior inconsistent statement; many of the present exceptions to the hearsay rule might lead the trier of fact to find the existence of a fact on much less reliable out-of-court statements than those admitted under the proposed rule.

In Study Paper No. 2, *Manner of Questioning Witnesses,* we noted the distinction between writing used to refresh the memory and writing used as past recollection recorded. Under proposed subsection 3 (2), when a witness identifies a writing as one made by him on an earlier occasion but confesses that his memory is not refreshed by it, the earlier statement will nevertheless be receivable as evidence of the truth of the matter stated without indulging in the present fiction of refreshing memory. For example, the witness may be able to testify that on an earlier occasion, while the facts were fresh in his mind, he recorded the licence number of the vehicle allegedly involved in the disputed event; even though unable at trial to recall that number, evidence of it will be admissible under the proposed section. The witness may be cross-examined respecting the accuracy with which he made the notation. Circumstances surrounding the making of the earlier statement will affect the weight of the evidence, but not its receivability.

The proposed section will also permit evidence of an out-of-court conversation between the witness and another witness to be given in a more natural and meaningful manner than at present. By the present law the witness is generally permitted to testify to what he himself said to X, and what he did as a result of what X said, but is not permitted to relate what X said to him; what X said will be later testified to by X. The witness is often confused by the objections and the trier of fact receives the evidence in an unnecessarily interrupted way.

One of the dangers of admitting a witness' prior consistent statements at trial is that the witness will prepare before trial a careful written statement of his evidence and then simply put his case in by use of these documents. This would destroy the principle of orality in legal proceedings, avoid the prohibition against leading questions on direct examination, and enable an insincere witness to present a smoothly coherent story which could often not be duplicated on direct examination. To avoid such, the subsection provides that it is not applicable to a statement which was made for the purpose of setting out the evidence which a person could be expected to give as a witness in pending or contemplated legal proceedings.

Subsection 3 (3) Admissions

The present law permits the reception into evidence of extra-judicial statements made by a party to an action when tendered by a party opponent as adverse to the maker's case. Under the present law these statements are referred to as admissions and are considered as a hearsay exception.

In the proposed draft we have retained this characterization of admissions. However, unlike other exceptions to the hearsay rule the admissibility of admissions has never been justified soley on the basis that the admissibility of such statements is necessary, or on the basis that such statements are made under circumstances that assure the trier of fact of its reliability. Indeed, under the present law admissions are admissible even though when made they were not against the party's interest, (4 Wigmore, *Evidence,* sec. 1048; *Falcon v. Famous Players Film Co.,* [1926] 2 K.B. 474, 489) and even though the party did not have personal knowledge of the fact which he admits, (*Stowe v. Grand Trunk Ry.* (1918), 39 D.L.R. 127 (Alta. C.A.)). Thus admissions are received not because they assure the trier of fact of reliability in satisfactory substitution for the absence of the oath and cross-examination, but rather because of the nature of the adversary system. Under the adversary system a party can hardly object that he had no opportunity to cross-examine himself on a statement that he has made, nor should he be heard to require that his own statements be under oath or not worthy of belief.

Paragraph (a) states the basic rule. Confessions are but one kind of admission and additional requirements with respect to them will be treated in another section of the Code. The remaining four paragraphs specify four categories of statements that at common law a party was deemed to be sufficiently responsible for to justify their reception as admissions.

Paragraph (b) states the law existing at present. (*R. v. Christie,* [1914] A.C. 545; *Chapdelaine v. The King,* [1935] S.C.R. 53.) A statement may be treated as an admission by a party if he adopts it. The adoption may be expressed or implied. Silence in the face of an accusation may be considered an acquiescence to its truth and permit the reception of the statement made to him; silence however may be explained away and an accused exercising his right to remain silent in the face of accusations made in the presence of the police should not be prejudiced thereby, (see *R. v. Eden,* [1970] 2 O.R. 161 (C.A.); *Miranda v. Arizona* (1966), 384 U.S. 436, 468 and Cross, *Evidence,* 3d ed., 40; but see *R. v. Fargnoli,* [1957] O.R. 140 (C.A.) and *R. v. Cripps* (1968), 3 C.R.N.S. 367 (B.C.C.A.)). It is a condition of admissibility that there be evidence capable of supporting an inference that the statement was accepted by the party although since the Christie case (supra) the requirement that this evidence be led prior to receiving the statement has not been insisted on in all cases. The better view (see *Chapdelaine v. The King, supra,* and *R. v. Harrison,* [1946] 3 D.L.R. 690 (B.C.C.A.)) is to require the foundation evidence prior to receiving the statement to avoid unfair prejudice to the accused and the proposed paragraph is worded to accomplish that result.

If a party expressly authorizes another to make an admission on his behalf, it is logical that such an admission be treated as an admission of the party and paragraph (c) so provides. Implied authorization to make an admission is sometimes

found to exist by the present law in agency or employment relationships but only subject to rigid conditions, which usually result in the exclusion of the statement. To be receivable against his principal the statement must have been made by the agent acting within the scope of his employment and during the continuance of his employment. The courts have also imposed at times the requirement that the statement of the agent must have been part of the *res gestae*, part of the act done (*Confed. Life v. O'Donnell* (1886), 13 S.C.R. 218; *Bourgoin v. Sullivan*, [1942] Que. K.B. 593 (C.A.)) although this has been regarded as a confusion of two separate principles. (4 Wigmore, *Evidence*, sec. 1078). The development of the law in this area by analogizing to the substantive law of agency doctrine of a master's responsibility for his agent's acts has forbidden the reception of agents' descriptions of past acts done as "mere narrative" (*Confed. Life v. O'Donnell, supra*) and also statements of an agent to his principal as distinct from statements for him (Cross, *Evidence*, 3d ed., 442). The trend in the United States has been away from these various restrictions (McCormick, *Evidence*, 2d ed., 639, *Proposed Federal Rules of Evidence*, R. 801 (d) (2) (iv); and see Laskin J., dissenting, in *R. v. Shand Electric Ltd.*, [1969] 1 O.R. 190 (C.A.)) and the Evidence Project agrees that a liberalization is desirable along the lines of proposed paragraphs (c) and (d). In criticizing an older decision holding the exception to apply only to an agent's statements that were "within the scope of the agent's authority to speak for his principal" Wigmore noted:

> ". . . it is absurd to hold that the superintendent has power to make the employer heavily liable by mismanaging the whole factory, but not to make statements about his mismanagement which can be even listened to in court; the pedantic unpracticalness of this rule as now universally administered makes a laughing stock of court methods." (4 Wigmore, *Evidence*, sec. 1078, p. 166 n. 2.)

The assurance of reliability for statements about past events may be found in the agent's familiarity with the acts done in the course of business; the fact that the statements are normally against interest; and the fact that, at least while he is employed, an employee's statements are likely to be sincere. The reliability of statements to a principal as opposed to those made to an outsider is based upon by the fact that such statements are made for the purposes of some action being performed. Therefore they would appear to be at least as reliable as the evidence admitted under the existing exception for business records.

Paragraph (e) is simply a restatement of the existing law. (*Koufis v. R.*, [1941] S.C.R. 481; *R. v. Northern Electric*, [1955] 3 D.L.R. 449 (Ont. H.C.).) Statements by a person engaged in a common enterprise with a party are receivable as admissions against the party if the statements were made in furtherance of the common design. The justification underlying the reception of these statements is that there is an implied agency relationship between the individuals. Therefore statements made in furtherance of the common object are deemed to be authorized by all parties to it. The rule will operate most frequently in conspiracy trials but it is not limited to a particular cause of action.

Subsection 3 (4) Records

Under the common law statements made in the course of a duty are recognized as an exception to the hearsay rule. However, numerous restrictive conditions limit

the admissibility of these kinds of statements: the statement must have been made by a person who had a duty to record acts done by him personally; the statement must have been made contemporaneously with the acts described; the declarant when he made the statement must have had no motive to misrepresent the facts; and, finally, the declarant must be deceased at the time of trial. (See *O'Connor v. Dunn,* [1877] 2 O.A.R. 247; *Conley v. Conley,* [1968] 2 O.R. 677 (C.A.)). This exception to the hearsay rule is justified on two grounds: first, since the declarant must be dead at the time of the trial the exception is the only way of gaining his evidence; second, guarantees that the statement is trustworthy reside in the habits of precision generated from regularly recording business transactions and the likelihood that any errors will have been detected in records which form the basis for important decisions. (Cross, *Evidence,* 3d ed. 406, McCormick, *Evidence,* 2d ed., 720.)

The strict conditions of admissibility for this common law exception and the great inconvenience that they produced in the banking world was recognized and obviated in England in 1876 by the passage of the Banker's Books Evidence Act, 42 Vict., c.11 (U.K.). Prior to this passage entries in a banks' records could only be proved by producing the original records and by calling the clerks who had made the entries; by the new legislation copies of bank records could be received and relatively simple requirements for establishing their authenticity were provided. Comparable legislation copied from this English Act has long existed in Canada (see e.g. Canada Evidence Act R.S.C. 1970, c.E-10, s.29; Ontario Evidence Act R.S.O. 1970, c.151, s.34). The inherent reliability of records regularly made and relied on and the convenience of the procedures devised for their proof led to further legislation easing the proof of records kept by government departments and officials, (see e.g. Canada Evidence Act R.S.C. 1970, c.E-10, ss. 19, 20, 21, 22, 23, 26, 27; Ontario Evidence Act R.S.O. 1970, c. 151, ss. 25, 26, 27, 28, 29, 30, 32, 39, 40, 41).

Recently various provincial legislatures and the Parliament of Canada have eased proof requirements for business records generally (Canada Evidence Act R.S.C. 1970, c.E-10, s.30; British Columbia Evidence Act R.S.B.C. 1960, c.134, as am. S.B.C. 1968, c.16, s. 43a; New Brunswick Evidence Act R.S.N.B. 1952, c.74, as am. S.N.B. 1960, c.29, s.42a; Nova Scotia Evidence Act R.S.N.S. 1967, c.94, s.22; Ontario Evidence Act R.S.O. 1970, c.151, s.36; Saskatchewan Evidence Act R.S.S. 1965, c.80, as am. S.S. 1969, c.151, s.30a. The Ontario and Canada Evidence Act provisions require advance notice of the litigant's intention to use this technique of proof while the other four statutes do not. Some of these statutes are modelled after the Federal Business Records Act, 23 U.S.C.A. s. 1732 in the United States.) By statute then, with respect to various records regularly kept the old restrictions of the common law have been removed. For example, the business records section in the Canada Evidence Act, subject to certain restrictions, provides:

> **30(1)** Where oral evidence in respect of a matter would be admissible in a legal proceeding, a record made in the usual and ordinary course of business that contains information in respect of that matter is admissible in evidence under this section in the legal proceeding upon production of the record.

The death of the declarant is no longer required and other conditions of admissibility, (personal knowledge, duty to act, duty to record, contemporaneity with acts

done, motive for falsification) have been converted into factors affecting the weight to be given to the evidence. The word business has been broadly defined:

> **30(12)** "business" means any business, profession trade, calling, manufacture or undertaking of any kind carried on in Canada or elsewhere whether for profit or otherwise, including any activity or operation carried on or performed in Canada or elsewhere by any government, by any department, branch, board, commission or agency of any government, by any court or other tribunal or by any other body or authority performing a function of government.

Indeed the definition includes so many activities that it is interesting to compare the latest draft of a comparable section in the United States (Proposed Federal Rules of Evidence, 1973, R. 803(6)) in which "business records" is supplanted by the phrase "records made in the course of a regularly conducted activity," in recognition of the fact that it is the routine and repetitive nature of the records that guarantees reliability rather than the mere use of the adjective "business".

The need for change in this area to meet modern conditions was recently recognized in our courts (*Ares v. Venner,* [1970] S.C.R. 608; *C.P.R. v. City of Calgary,* [1971] 4 W.W.R. 241 (Alta. C.A.)) as well as in the legislatures above-noted and the Evidence Project agrees completely with this trend toward liberalization. We suggest by the proposed subsection a form of omnibus provision to cover all records made in the course of a regularly conducted activity. It is anticipated that should this proposed section be enacted, all of the above-noted sections of the Canada Evidence Act would be repealed. It should be noted that the breadth of this proposed exception would also sanction the receipt in evidence of material now receivable under the common law exception known as "public documents" or "public records" and thereby removes many of the stringent conditions of admissibility presently demanded by that exception. For example, we agree with Professor Baker that:

> Accessibility of the public to documents should never have been raised from the status of an additional reason for admitting official records to that of a condition of admissibility. (Baker, *The Hearsay Rule,* 137 (1950).)

and we believe that the "duty to record in a regularly conducted activity" is sufficient guarantee of reliability to justify their reception.

The proposed section begins by describing the admissible evidence as "a memorandum, report, record, or data compilation, in any form" rather than simply as "a record". This was done to prevent any restrictive interpretation of "record" to matters contained in books of account or logs (as in *Watkins Products Inc. v. Thomas,* [1965] 54 D.L.R. (2d) 252; but see, *contra, Re Martin and The Queen* (1973), 11 C.C.C. (2d) 224 (O.H.C.)). "Data compilation" is intended to include, but of course is not restricted to, electronic computer print-outs. The section then provides that the things described may be "acts, events, conditions, opinions or diagnoses" to prevent restrictive interpretations rejecting diagnostic entries (as in *Adderly v. Brenner,* [1968] 1 O.R. 621 (H.C.); but see *Farris v. M.N.R.,* [1970] C.T.C. 224). The advance notice requirement mentioned in sec. 30(7) of the Canada Evidence Act has been deleted following the pattern of the other provincial enactments which make no such condition necessary. We agree with the Eleventh Report of the Clinical Law Revision Committee, in England, 1972, that the fact

> ". . . that the record should have been compiled by a person acting under a duty or otherwise in a responsible position . . . seems to us to make the likelihood that the statement is reliable great enough to justify dispensing with the requirement to give notice of intention to give the statement in evidence." (p. 150)

Unlike the existing sections in the Canada Evidence Act the proposed section has no provision for the receipt of copies of the admissible records nor for the manner of satisfying the trial judge as to their authenticity as a record of a regularly conducted activity; questions of authenticity and identification of evidence generally and the manner of determining whether conditions of admissibility are satisfied will be dealt with in other sections of the proposed code.

Subsection 3(5) Learned Treatises

An expert's opinion if frequently founded on information gained from the writings and instruction of others and, despite an initial reluctance to receive into evidence the actual books regarded by the expert as authoritative (see *Collier v. Simpson,* [1831] 172 E.R. 883), the common law now provides, as summarized by the Alberta Court of Appeal:

> An expert medical witness may, therefore, upon giving his opinion, state in direct examination that he bases his opinion partly upon his own experience and partly upon the opinions of text writers who are recognized by the medical profession at large as top authorities. I think he may name the text writers. I think that he may add that his opinion and that of the text writers named accords. Further I see no good reason why such an expert witness should not be permitted, while in the box, to refer to such text books as he chooses, in order, by the aid which they will give him, in addition to his other means of forming an opinion, to enable him to express an opinion; and again that the witness having expressly adopted as his own the opinion of the text writer, may himself read the text as expressing his own opinion. In cross-examination an expert medical witness having first been asked whether a certain text book is recognized by the medical profession as a standard author and having said that it is, there may be read to him a passage from the book expressing an opinion, for the purpose of testing the value of the witness's opinion, *(R. v. Anderson* (1914), 16 D.L.R. 203, 219.)

The recommended provision is taken mainly from the Military Rules of Evidence, Queen's Regulations and Orders, 1971, Rule 57 but the Evidence Project has added the proviso restricting the physical introduction of the material to avoid the danger that the trier of fact might misunderstand the contents of the material if unaided by the expert witness. (See Proposed Federal Rules of Evidence, 1973, R. 803(18).)

A witness who testifies to reputation is in effect testifying to what a number of people have said and his evidence is therefore hearsay. The common law however has long received reputation evidence as an exception to the hearsay rule (Cross, *Evidence,* 3d ed. 457) for the purpose of establishing matters of public or general interest (*O'Connor v. Dunn,* [1876] 39 U.C.Q.B. 597), family relationships (*R. v. Lindsay* (1916), 36 O.L.R. 171) and traits of character (*R. v. Tilley,* [1953] O.R. 609 (C.A.); *R. v. Rowton,* [1865] Le. & Ca. 520); and see the Evidence Project's previous Study Papers on Credibility and Character). The proposed section is an attempt to codify this broad common law exception since we agree with Professor Wigmore that:

> The circumstances creating a fair *trustworthiness* are found when the topic is such that the facts are likely to have been inquired about and that persons having personal knowledge have disclosed facts which have thus been discussed in the community; and thus the community's conclusion, if any has been formed, is likely to be a trustworthy one. (5 Wigmore, *Evidence,* see. 1580, p. 444.)

The proposed section is drawn mainly from Proposed Federal Rules of Evidence, 1973, R. 803 (19), (20), (21).

LAW REFORM COMMISSION

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EVIDENCE

10. THE EXCLUSION OF ILLEGALLY OBTAINED EVIDENCE

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INTRODUCTION

The question of whether illegally obtained evidence should be admissible has been debated at length, yet remains controversial.[1] There are good arguments for what can be called the American position: the exclusion of both illegally obtained evidence and all other evidence derived from it. There are equally good arguments for the traditional English and Canadian positions: that evidence should not be excluded simply because it has been illegally obtained.

The conflicting positions of judges and commentators, some tinged with emotion, demonstrate that no legislative solution can satisfy everyone or discourage spirited debate. This is so because the problem cannot be severed from the criminal justice system as a whole. In solving the problem, the orientation of the entire system is at stake.

It is often said that in criminal law, especially in matters of evidence, the legislator must find the proper balance between the imperatives of suppressing crime and guaranteeing fundamental human rights, between efficiency and fairness, between crime control and respect for individual freedom, and between the need to search for the whole truth and the need to safeguard certain basic values. The problem of admissibility of illegally obtained evidence raises these issues. Any solution to the problem reflects an inevitable choice between sets of apparently contradictory values.

A further difficulty arises because the question of the admissibility of illegally obtained evidence is often considered through the limited experience of particular applications of the existing rule. As a result, positions are taken for or against a general rule of exclusion on the basis of a limited analysis of specific situations such as illegal search and seizure, illegally obtained confessions and illegal arrests. There is always the temptation to generalize without keeping in mind the problem in its entirety.

The general reader may be helped in understanding this difficulty if the problem is situated in relation to the primary purpose of the rules of evidence. That purpose is to place before the courts sufficient information to allow factual conclusions to be made from which legal consequences may be drawn. Therefore, it follows that all evidence that is relevant to an issue in dispute should be admitted. Relevance, therefore, becomes a basic condition for admissibility. But there are others. The search for truth in the criminal law process where guilt and innocence are determined is not made without some sacrifice. Other values of a social or moral nature deemed more important by the law and the courts may override this search. For example, discussions between an accused person and his lawyer may

result in relevant information being revealed that could bear on the accused's guilt or innocence. Yet in order to protect the fundamental rights of the defendant and to allow free and open discussion between an accused person and his lawyer, the law protects these communications from public disclosure.

Credibility may also be an important condition for admissibility. Relevant evidence may be excluded because it is untrustworthy. For example, the most commonly accepted rationale for the exclusion of confessions obtained as a result of threats or promises is that they are untrustworthy. But other rationale may be found for this rule. If a court should accept as admissible evidence, a confession made in such circumstances, would not the court be acting as an accessory to the illegality? By admitting an illegally obtained confession, would not the court be legalizing or at least tacitly approving an illegality? Moreover, would not this be tantamount to a judicial rejection of the privilege against self-incrimination?

The problem of illegally obtained evidence concerns both testimonial and real evidence. For testimonial evidence, notably confessions, exclusion may be justified for other reasons (privilege against self-incrimination, or untrustworthiness) than the illegal manner in which the evidence was obtained. The rules laid down by *Ibrahim v. Rex*[2] and *Boudreau v. The King*[3] reflect this phenomenon.

But for real evidence, the illegality that has accompanied its gathering does not make the evidence any less reliable or relevant. There is in fact no difference in the evidentiary reliability or relevance of the discovery of a stock of illicit drugs whether the police seized it illegally and violently or in conformity with applicable law and procedure when the question to be answered is whether the accused had the stock in his possession. The case of the *Attorney-General of the Province of Quebec v. Bégin*[4] illustrates this distinction.

Where the illegality committed in obtaining evidence directly affects its credibility, the problem could be avoided by basing exclusion on reliability. Here, the quality and credibility of the evidence justify exclusion rather than approbation of the illegal act by which it was gathered. However, the problem in its entirety is not so easily resolved, for evidence obtained indirectly through an illegal act may not lack reliability. If, as a result of a forced confession, the police discover incriminating real evidence, for example, the murder weapon, should this weapon be admissible as evidence? And since the discovery of the weapon corroborates at least part of the confession of the accused, should this part be admissible as well?[5]

To summarize at this point, this paper attempts to provide the elements of a solution to the following problem: where illegally obtained evidence is deemed to be relevant and trustworthy, should it be admissible, leaving the task of repressing the illegal acts involved to other techniques (criminal, tortious or disciplinary sanctions)? Or should such evidence be excluded even though it is relevant and reliable, placing loyalty to the rule of law above considerations of efficiency, clearly indicating on the one hand disapproval of the illegal acts involved, while on the other hand confirming the supremacy of certain fundamental rights over the search for truth?

THE PRESENT STATE OF CANADIAN LAW

Canadian law has followed English law: the illegality of the means used to obtain evidence generally has no bearing upon its admissibility. If, for example, a person's home is illegally searched—without a search warrant or reasonable and probable cause for a search—the person may sue the police for the damages incurred, complain or demand disciplinary action or the laying of criminal charges. But, the evidence uncovered during this search together with all evidence derived from it is admissible. Similarly, if an accused person, threatened with violence, confesses to a murder and tells the police where the murder weapon can be found, his statements indicating the location of the weapon as well as all evidence that tends to prove that this weapon is the murder weapon are admissible, even though the confession itself is inadmissible because it was made involuntarily, and was thus illegally obtained. In short, the Canadian position is that real evidence, however it is gathered as well as evidence derived from it, is admissible despite any illegality committed by the police in obtaining it.

This rule of Canadian law has evolved through a number of judicial decisions culminating in the decision of the Supreme Court of Canada in *R. v. Wray*[6] in 1970. It is significant that, in this decision, the Supreme Court examined the English common law in some detail, particularly as expressed by the English courts in *Kuruma v. The Queen*[7], *Noor Mohamed v. The King*[8], and *Callis v. Gunn*[9], but almost completely ignored American cases that have dealt with this topic.

The traditional Canadian position was first stated in 1886 in the *Doyle* case[10], a decision of the Ontario Court of Appeal. In that case, the accused alleged that an illegal search of his house had been made during which a number of alcoholic beverages were found—the possession of which was against the law. But the Ontario Court of Appeal, following an English precedent, refused to reverse the decision of the trial court which had convicted the accused solely on the basis of the objects found during the illegal search.

Over the years, a number of other decisions have reaffirmed this principle of the admissibility of relevant evidence whether or not it has been obtained illegally.[10a] In 1949, McRuer J. of the Ontario High Court held in *R. v. St. Lawrence*[11] that evidence uncovered as a result of an involuntary (and hence inadmissible) confession was, itself, admissible in evidence. Then in 1959 in a case concerning the legality of a blood test, *Attorney-General of the Province of Quebec v. Bégin*[12] the Supreme Court of Canada followed the English precedent of *Kuruma*[13] holding that relevant evidence, even if illegally obtained, may be admitted, thus adopting the rule laid down by the Privy Council. In the Bégin case, a specimen of the accused's

blood had been taken, without violence or force, and without the accused being told that he was not legally obligated to provide such a specimen. In his judgment, Fauteux J. held:

> Without doubt, the method used in obtaining certain of this evidence can, in certain cases, be illegal and even give rise to appeals of civil or even criminal order against those who have used it, but the proposition will not be discussed further, since in this case, illegality tainting the method of obtaining the evidence does not affect *per se* the admissibility of this evidence in the trial.[13a]

Prior to *Wray,* it could be said that Canadian law allowed the admission of real evidence discovered as a result of a non-admissible confession as well as those parts of the confession corroborated by the discovery, in spite of any illegalities that might have been present in the means used to obtain this evidence. The *Bégin* case provided some needed guidance in dealing with the admissibility of illegally obtained evidence and related involuntary confessions. Expert evidence on blood specimens in *Bégin* was considered to be testimony concerning real evidence— consequently, the rule stated in the case applies only to real or physical evidence.

In 1970 in *Wray*[14], the subject of numerous commentaries and criticisms[15], the Supreme Court faced the problem. Wray, charged with murder, had made a confession, ruled inadmissible at trial, and told the police that he had thrown the murder weapon into a swamp. The police, led by Wray, found a rifle which was introduced as an exhibit at the trial. As well as the rifle, the prosecution sought to have admitted as evidence that part of Wray's confession corroborated by the discovery of the rifle. In upholding the decision of the trial judge excluding both the rifle and the involuntary confession, the Ontario Court of Appeal held that a court can reject relevant evidence if its admission would be unfair to the accused or would bring the administration of justice into disrepute[16]. However, this decision was reversed by the Supreme Court of Canada which ruled that discovery of the murder weapon was admissible evidence. Also ruled admissible was that part of the accused's confession which described throwing the rifle into the swamp where the police found it. The majority judgment by Martland and Judson JJ., re-affirmed the ruling in *R. v. St. Lawrence*[17], reviewed at length the *Kuruma* case[18], then reached the conclusion that a trial judge does not have the authority at common law to exclude evidence otherwise admissible solely because its admission would bring the administration of justice into disrepute.

> This development of the idea of a general discretion to exclude admissible evidence is not warranted by the authority on which it purports to be based. The dictum of Lord Goddard, in the *Kuruma* case, appears to be founded on *Noor Mohamed,* and it has, I think, been unduly extended in some of the subsequent cases. It recognized a discretion to disallow evidence if the strict rules of admissibility would operate unfairly against the accused. Even if this statement be accepted, in the way in which it is phrased, the exercise of a discretion by the trial judge arises only if the admission of the evidence would operate unfairly. The allowance of admissible evidence relevant to the issue before the court and of substantial probative value may operate unfortunately for the accused, but not unfairly. *It is only the allowance of evidence gravely prejudicial to the accused, the admissibility of which is tenuous, and whose probative force in relation to the main issue before the court is trifling which can be said to operate unfairly.*[19]

Judson J., in a separate judgment, agreed that illegally obtained evidence was admissible but preferred a narrower application of any general rule of

admissibility.[20] He was of the opinion that the decision in *R. v. St. Lawrence* was applicable, that illegally obtained evidence should be excluded if it was untrustworthy. Judson J. reasoned that all real evidence or parts of a confession corroborated by real evidence should be legally admissible because they are trustworthy. He did refuse, however, to admit as evidence that part of Wray's confession that described the accused as having himself thrown the weapon to the spot where it was found by the police because he felt that the truth of this statement was not definitely confirmed by the discovery of the rifle in the same spot.

The *Wray* decision occasioned strong dissenting opinions by Cartwright C.J. and Hall and Spence JJ.[21]. The Chief Justice based his dissent on a different rationale for the exclusion of an involuntary confession, favoring the approach in *Declercq v. The Queen*[22]. In his view, a confession is not inadmissible simply because it is untrustworthy for, once it is confirmed by other evidence, it should be admitted.[23] The true rationale of the exclusionary rule lies in the rule against self-incrimination (*memo tenetur seipsum accusare*). If a confession is coerced and must be rejected, the discovery of evidence confirming the truth of part of the confession should not render it admissible either in whole or in part.

> The result which would seem to follow if the exclusion is based on the maxim (*memo tenetur seipsum accusare*) would be that the involuntary confession even if verified by subsequently discovered evidence could not be referred to in any way.[24]

The Chief Justice was also of the opinion that there existed in common law a discretionary power to exclude evidence, even if the evidence had a substantial probative value, following the decision below of the Ontario Court of Appeal.

Hall J. questioned the reasoning in *R. v. St. Lawrence*. He suggested, without giving a definitive opinion, that it is unreasonable to break apart a confession, admitting one part in evidence because it is corroborated, if during the voir-dire the entire confession was ruled inadmissible because it was involuntary.[25]

Legal commentators in analyzing the Supreme Court of Canada's decision in *Wray* have agreed on three criticisms.[25a] The first concerns the Privy Council's decision in *Kuruma* which the majority opinion follows. This should not have been relied upon as a basis for a general principle because of the rather exceptional facts and circumstances surrounding the case.[26] The second criticism suggests that the Supreme Court of Canada should have considered other decisions such as *R. v. Barker*[27] in which the English Court of Criminal Appeal rejected the prosecution's attempts to submit certain incriminating documents obtained as a result of an inadmissible confession. The third criticism considers that *Wray* almost completely eliminates the judge's discretionary power to exclude evidence, without getting to the root of the problem, without assessing the framework for discretion proposed by the Ontario Court of Appeal, and without formulating other criteria.[28] Quite understandably, however, lower courts have followed the *Wray* decision: most recently the Ontario Court of Appeal in *R. v. Lafrance*[29], and the British Columbia Court of Appeal in *R. v. Pettipiece*[30].

Early in 1974, the Parliament of Canada enacted as law Bill C-176 concerning the protection of privacy through the control of wire tapping and electronic eavesdropping generally.[31] Several provisions of this legislation must be examined

here since they affect Canadian law on illegally obtained evidence. But first, two preliminary observations are necessary. This legislation deals only with certain specific and limited aspects of the problem of admissibility of illegally obtained evidence. And, as several commentators have demonstrated,[32] the problems raised by gathering evidence through illegal wire tapping are quite different from those engendered by illegal seizures, searches, and confessions. In fact, enforcement authorities are not as concerned with wire tapping and the admissibility as evidence of a tape recorded conversation as they are with the information contained on the tapes which might lead to further enforcement or crime prevention activities. In other words, it is often more important to the police that evidence discovered as a result of intercepted conversations be admissible rather than the conversation itself. In allowing legal telephone interceptions, the legislation in effect "neutralizes" the telephone as a tool or instrument for criminal purposes, thus making crime more difficult for the professional criminal.

The major impact of the legislation on admissibility arises from the amendment to section 178 of the Criminal Code by adding subsection 16, paragraphs 1 and 2 of which follow:

> **178.16** (1) A private communication that has been intercepted and evidence obtained directly or indirectly as a result of information acquired by interception of a private communication are both inadmissible as evidence against the originator thereof or the person intended by the originator thereof to receive it unless
>
> (*a*) the interception was lawfully made, or
>
> (*b*) the originator of the private communication or the person intended by the originator thereof to receive it has expressly consented to the admission thereof.
>
> (2) Where in any proceedings the judge is of the opinion that any private communication or any other evidence that is inadmissible pursuant to subsection (1)
>
> (*a*) is relevant, and
>
> (*b*) is inadmissible by reason only of a defect of form or an irregularity in procedure, not being a substantive defect or irregularity, in the application for or the giving of the authorization under which such private communication was intercepted or by means of which such evidence was obtained, or
>
> (*c*) That, in the case of evidence, other than the private communication itself, to exclude it as evidence may result in justice not being done,
>
> he may, notwithstanding subsection (1), admit such private communication or evidence as evidence in such proceedings.

These provisions establish inadmissibility as the general rule for all illegal interceptions of private communications as well as all other evidence obtained directly or indirectly from such illegal interceptions. At first glance, the rule as enunciated in subsection 178.16(1) appears to be contrary to the traditional common law position since it would exclude all illegally obtained evidence. But given the wording of this section, it would appear that inadmissibility affects only the author of a communication and the person for whom it was intended. As a result, information or evidence obtained from an illegal interception of a conversation between A and B would seem to be admissible as evidence in a case against C. Furthermore, subsection 178.16(2) seems to restrict even further the general rule of inadmissibility. This provides that even if a conversation is illegally intercepted, it may be admitted as evidence if the judge deems it relevant and considers that the legality is only a "defect in form" or an "irregularity in procedure" and not a

substantive or fundamental defect or irregularity. The legislators have attempted to balance society's need for law enforcement against the individual's right to privacy. A fundamental irregularity is treated as important enough to justify the exclusion of tape recorded conversation as evidence, but irregularities in form or procedure are regarded as too trivial to justify the exclusion of relevant evidence from the trial process.

Lastly, subsection 178.16(2) (*b*) grants a broad discretionary power to the individual judge. He may admit evidence obtained as a result of an illegal interception if he believes that "to exclude it . . . may result in justice not being done." A close reading of this Act demonstrates that our legislators continue to stress the importance of relevance as the primary criterion in admitting evidence—an approach consistent with the traditional Canadian common law position. The exceptions mentioned previously indicate that an illegality or irregularity in obtaining evidence can be overlooked when two conditions are fulfilled, and relevance is the first of these conditions.

One could fairly conclude that this legislation favours the discovery of evidence by illegal means over the absolute protection of the right to privacy. However, the legislators, at least in stating a general rule of inadmissibility, have reversed the traditional Canadian position. The exclusion of evidence has become the rule, its admissibility the exception. Nevertheless, how the exceptions to the rule are defined in practice could very well undermine its force and effectiveness.

Take, for example, the expression used in subsection 178.16(2) (*c*): "to exclude it as evidence may result in justice not being done." Is it possible that this statement has the same thrust as the formula for judicial discretion proposed by the Ontario Court of Appeal in *Wray*? Does being "just" mean avoiding being unjust to the accused or rather avoiding the discrediting of the administration of justice? Could not the expression be interpreted in other ways—for example, as allowing the judge to admit illegal evidence if he believes that without it the prosecution could not begin to establish the essential elements of the offence of which the accused is charged and probably guilty, and thus without it, justice would not be done?

It is obviously too soon to know how the courts will interpret these provisions and the breadth of the judicial discretion they confer. But two important points can be made. Canadian legislators now recognize that relevance, at least in the narrow area of wire tapping, should not be the only condition of admissibility. And furthermore, the courts should exercise certain discretionary powers in determining the admissibility of evidence. Thus, Canadian law has not been fixed in either of the polar positions on illegally obtained evidence in which some other jurisdictions now find themselves.

To summarize briefly, the present position of the law in Canada follows the decision of the Supreme Court of Canada in *Wray* and admits all evidence even though illegally obtained, provided the evidence is relevant to the issues in dispute and not excluded for some other reason (as in the case of involuntary or coerced confessions). Thus the illegality or irregularity of the means used to obtain evidence does not affect its admissibility. A judge, if *Wray* is followed, would only have a

narrow discretionary power to refuse to admit relevant and credible evidence. Moreover, evidence derived from inadmissible evidence can be admitted if it conforms with the general conditions for admissibility. But the wire tapping situation differs somewhat, at least in the stating of rules and exceptions. The exclusionary rule is entrenched legislatively but in certain special cases, where evidence is relevant, the rule may be abandoned even though the evidence is directly or indirectly the result of an illegality.

ELEMENTS OF COMPARATIVE LAW

At this point, it is enlightening to glance briefly at the solutions adopted by a number of other countries. However, variations in social philosophies and judicial traditions must be remembered when assessing the relevance of foreign solutions to the Canadian context.

American Law

After long controversy, the evolution of American common law culminated in the acceptance of an exclusionary rule for illegally obtained evidence.[33] This position was established in a number of very important decisions such as *Weeks v. U.S.*[34], *Wolf v. Colorado*[35] and notably *Mapp v. Ohio*[36]. The American rule excludes all evidence gathered directly or indirectly as the result of an illegality or a violation of the fundamental human rights guaranteed by the Constitution of the United States. Starting from the same point as Canadian law—that all relevant evidence, even if illegally obtained, is admissible[37]—American law overcame the first obstacle in *Weeks v. U.S.*[38]. Here, the Supreme Court of the United States held that evidence obtained in violation of the Fourth Amendment to the United States Constitution could not be admitted because to do so would eliminate the protection which this Amendment was intended to confer on all Americans. The rule excluding illegally obtained evidence gathered in searches and seizures extended not only to directly obtained evidence but also to all evidence that indirectly resulted from information discovered in an illegal search or seizure.

A second important step in the development of American law occurred in *Wolf v. Colorado*[39]. In this case, the fundamental liberties guaranteed by the first eight amendments to the United States Constitution were held to be protected by the Fourteenth Amendment which forbids the individual states from depriving a person of his life, liberty, and property without "due process of law".

Finally, in 1961, the well known decision in *Mapp v. Ohio*[40] extended the general application of the exclusionary rule to all American courts including State Courts. Doubts had arisen prior to this decision because in *Wolf* the Supreme Court of the United States had appeared to allow individual States to use other techniques to enforce the Fourteenth Amendment.

At present then, in the United States, evidence directly obtained by an illegal method is excluded as too is evidence derived from it—what American jurists call "the fruit of the poisoned tree". Moreover, the American rule applies to material or real evidence as well as testimonial evidence.[41]

Legal commentators have noted three important exceptions to the application of the American exclusionary rule. It is not applicable, first, when evidence is admitted not to show the guilt of the accused but on a collateral question; second, when a violation has taken place at the expense of a person other than the accused; and finally, when evidence has been gathered by an individual on his own initiative rather than by a public official.[42]

It is particularly interesting to note that the development of the American exclusionary rule is directly tied to judicial interpretation of the Constitution of the United States and the problem of guaranteeing individual liberties and fundamental human rights. American courts have held that the exclusion of illegally obtained evidence and all evidence derived from it constitutes a reasonable protection of fundamental liberties at two levels. First of all, it has an exemplary value for police officers. By excluding all evidence they may obtain illegally, it is hoped that the police will be discouraged in the future from using such tactics and that in the long term, the entire criminal investigation system will be improved. Secondly, excluding evidence indicates that American law truly respects the need for "due process", ranking it above all other considerations including law enforcement. In essence, the American position rests on the belief that fundamental liberties guaranteed by the United States Constitution are undermined if the rule of law is not respected.

Currently, however, perhaps sparked by the absolute nature of the exclusionary rule, there is a substantial current of opposition.[43] A number of legal commentators foresee either a return to the former position of admissibility, or some relaxation of the present rule. A more extensive discussion of the merits of the American position appears in the third part of this study.[44]

English Law[45]

In England, the decision in *Kuruma v. The Queen*[46] has determined the direction of the common law on the admissibility of illegally obtained evidence. In this case, which took place during the Kenyan uprisings, the accused was stopped at a military control point after he had cycled down a road controlled by military authorities. He was searched by two low-ranking officers who found a knife and some ammunition. Sentenced to death, he appealed to the Privy Council, arguing that the search was illegal and thus the evidence obtained from the search should be considered as inadmissible. Under the Emergency Regulations of Kenya, the search could only be made by higher ranking officers. In dismissing the appeal, the Privy Council held that:

> In their Lordships' opinion, the test to be applied in considering whether the evidence is admissible is whether it is relevant to the matters in issue. If it is, it is admissible and the court is not concerned with how the evidence was obtained.[47]

The English position is that evidence is admissible even if obtained through contraventions of the common law, statutes or rules of a constitutional nature. But in the same decision, the Privy Council acknowledged that a judge has the discretionary power to exclude evidence which would unfairly prejudice the accused if the rules of admissibility were strictly followed.

> No doubt in a criminal case the judge always has a discretion to disallow evidence if the strict rules of inadmissibility would operate unfairly against the accused.[48]

The example provided by the Privy Council concerned evidence obtained by deceitful or fraudulent means. Unfortunately, however, the language used was vague and does not indicate what meaning should be given to the word "unfair". Furthermore, no real guidance was given that would aid in determining whether or not unfairness would result to the accused by admitting certain kinds of evidence.

It may also be noted that the Privy Council in *Kuruma* was aware of the full effect of its ruling on the admissibility of illegally obtained evidence, pointing out that this rule would not apply to confessions.

> It is right, that it should be stated that the rule with regard to the admission of confessions, whether it be regarded as an exception to the general rule or not, is a rule of law which their Lordships are not qualifying in any degree whatsoever.[49]

Yet, as a result of *Kuruma*, the scope of the judge's discretionary power to exclude is much more limited than the generality of the language in the decision indicates on first reading. The power only operates in marginal cases. The English Courts have only excluded illegally obtained evidence when it has been obtained by false representation or a deception of a particularly serious nature in the light of the circumstances surrounding the case.[50] It is in this sense that *Kuruma* has been compromised by the Supreme Court of Canada in *Wray*[51].

Without going further, the English and American positions can be considered to be diametrically opposed. English law, contrary to American law, does not see the problem of admissibility of illegally obtained evidence in the terms of individual rights and liberties. English judges appear not to share the aspirations of their American counterparts that an exclusionary rule can be dissuasive and help prevent violation of an individual's civil rights. Instead, the English common law adheres to a sole condition for admissibility—the relevance of the evidence. An an English court expressed it in *R. v. Leatham*:

> It matters not how you get it; if you steal it, it will still be admissible in evidence.[52]

In striking contrast to the situation in the United States, there has been little discussion in England of the merits of the English position and the policies underlying it. Justification for the English rule, when expressed, is based on the fear that adopting a general exclusionary rule would paralyse the criminal justice system.

Scottish Law[53]

Scottish law differs markedly from the English common law in several important respects. The leading case in the area is *Lawrie v. Muir*[54], decided in 1950. In this case, Lord Cooper, stressing the importance of reconciling the interests of the State and the individual, was of the opinion that the rule need not be absulute. It should recognize on the basis of the facts in each case, the prevailing interests of one or the other. All relevant evidence need not be admitted in every case, whether illegally obtained or not, nor should relevant evidence tainted by the slightest irregularity be rejected automatically.

Scottish law, as does English law, recognizes the need for admissibility of relevant evidence. However, the discretionary power of the judge to exclude relevant evidence is not limited by the test of "unfairness" to the accused. A recent study on the question[55] indicates that the Scottish and Irish courts use the following criteria when exercising their powers of discretion:

1. Was the illegality part of a deliberate plan to obtain evidence?
2. Is the illegality serious?
3. Was quick action necessary to avoid destruction or loss of evidence?
4. Were the perpetrators of the illegality law officers or private citizens?
5. Under the circumstances, was it reasonably possible to conform to the requirements of the law?
6. Is the crime of which the defendant stands accused a serious crime?
7. Were the means used to obtain the evidence the only practical means available for the effective detection of the crime?

Thus, Scottish law has tempered the English position by increasing judicial discretion. Located about half-way between the English and American positions, Scotland's situation is interesting to law reform, for this jurisdiction has made tangible progress in resolving the traditional conflict between exclusion and admissibility. In Scotland, admissibility or exclusion is not the inevitable consequence of an all-encompassing and arbitrary position. Rather, it is the concrete result of a judicial determination in each case of the values that ought to prevail in that setting.

French Law[56]

In France, the development of the law in this area is not easily explained because of the considerable differences between the French and the Canadian legal systems. The presence of a *juge d'instruction* (best translated as "examining magistrate") responsible for gathering and compiling evidence, the various controls on this judicial officer, the regulation of police investigations, the concept of the *intime conviction* are some of the factors which make a comparison difficult.

In brief, and very generally, a judge in France cannot found an *intime conviction* (ie., his opinion on whether to convict or not) on an irregular act because of Article 173 of the French Code of Criminal Procedure. Moreover, French jurisprudence indicates that the *juge d'instruction* while investigating must respect the provisions of the law and the principle of conformity (*loyauté*) in his search for evidence. Evidence revealed by illegal or unjust procedures against the accused are excluded. In this respect, however, French law distinguishes between "textual" and "substantial" irregularities. The former are violations of legislative provisions. The latter occur by violating or disregarding the rules of public order and the rights of the defence. Thus, evidence illegally obtained during the *instruction* or examination is, in principle, inadmissible. An irregularity in some instances may invalidate all related evidence.

It would appear that the same rules would apply to evidence resulting from a police inquiry, for example, at the time of the preliminary investigation and hearing. Nevertheless, there are in France, as in other countries, certain penal and disciplinary sanctions against those using illegal or unfair techniques to compile evidence.

In general, the administrative and judicial control of police forces appears to be effective.

There are many other foreign solutions. But two other jurisdictions outside the common law tradition deserve mention mainly because they are often cited as examples in Anglo-American legal writings—Germany and Israel. In principle, German law does not exclude illegally obtained evidence except when in a judge's opinion it has been obtained by a serious violation of basic rights. As in Scottish law, the nature of the illegality that has been committed is taken into consideration.[57] Israeli law deems the exclusionary rule to be useless and unjustified. It provides that when faced with an illegality committed in the search for evidence, the court can cite the responsible individual, convict him immediately or send him to another court for trial.[58] This solution is apparently applied to admissions, to confessions gained by illegal means and also to illegal searches and seizures.

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ANALYSIS OF THE MAIN ARGUMENTS IN FAVOUR OF THE EXCLUSIONARY RULE

Numerous arguments have been advanced for and against a reform adopting an exclusionary rule.[59] This study has merely attempted to review very briefly a number of these. It would be pretentious to attempt a detailed study of them all in such a short space and do justice to their authors.

Wigmore advanced three fundamental arguments in favour of the exclusionary rule for illegally obtained evidence:[60]

1. In the absence of other remedies, such a rule is necessary to deter illegal methods for obtaining evidence;
2. By eliminating the apparent condonation of illegal police practices, it contributes toward respect for the legal system; and
3. An exclusionary rule frees judges from what is felt by some of them to be a repugnant complicity in "dirty business".

However, Wigmore also suggested responses to these arguments:

1. That an exclusionary rule makes justice inefficient by impairing the main function of a trial—to find the truth of the criminal allegation;
2. That it coddles criminals by serving neither to protect potential victims nor to punish the offending officer, since it results in the acquittal of the guilty and the punishment of society by the release of criminals in their midst;
3. That it introduces additional complications into a system of criminal justice that is already over-burdened with technicalities.

A perusal of modern doctrines and the major legal decisions concerning this problem indicates that the arguments fall into two broad categories: one factual and practical, and the other theoretical and normative.

Factual Arguments

The first practical or factual argument in favouring exclusion of illegally obtained evidence is the dissuasive and long term preventive effect on abusive acts and practices by police forces. If the prosecution cannot submit illegally obtained evidence, it will affect the conduct of the police because they will become conscious of the futility of not respecting the law. In the long run, the dissuasive effects of the rule would improve the conduct of those responsible for controlling crime.

This argument was best expressed in *Mapp v. Ohio*[61] which made the exclusionary rule generally applicable to cases brought before American State courts. The impact of the dissuasive powers associated with the exclusionary rule has been the subject of extensive and bitter debate in the United States. The question is

indeed difficult to answer. Opinions are divided although currently, many commentators attach only relative importance to this argument. For example, one American author in a long article on the exclusionary rule and illegal searches and seizures, concluded that the exclusionary rule's dissuasive powers alone do not justify keeping the rule.[62] Statistical analysis and research into the impact of the exclusionary rule on police conduct in the United States seems to indicate that the expansion of the rule by *Mapp v. Ohio* has not contributed to any appreciable decrease in illegal police practices.[63]

The argument, frequently made against the existence of any dissuasive effect, reasons that no real impact on police behaviour is possible since the primary concern of the police is to gather evidence which will bring the accused to trial, police behaviour being dictated predominantly by the desire to convict. But, it is also argued that the role of the police is not only to charge and convict criminals but also to prevent crime.

The effect of the rule, so the earlier argument runs, must be limited since it has not prevented the police from making searches, seizures or other illegal investigations when their purpose is to harass an individual or suspect, to destroy or seize certain objects like drugs, or simply by preventive or intimidating measures to stop certain crimes from being committed. Indeed, the argument can be stretched further—the very existence of the exclusionary rule tending to encourage the police to use harassing tactics or other manoeuvres rather than searching for evidence to convict criminals at trial.[64]

Doubt about the dissuasive effects of the exclusionary rule has led to an examination of other measures that might operate to control or prevent illegal police activity, such as disciplinary sanctions and civil actions. But here too, controversy is rife. Many observers of the American system have concluded that the costs of a damage suit, the uncertainty of the chances of success, the relatively small amounts awarded as costs by the courts, the rather modest resources of most police officers, and the difficulty in some instances of holding the employer responsible for the actions of the employee, cast serious doubt on the effectiveness of a civil claim for damages as a means of controlling police practices. It is also observable that in practice a guilty party rarely sues, that his chances of success before a jury are slim, but that the innocent party is reluctant to sue because he seldom finds such an action profitable.

Faced with these obstacles and in order to improve the effectiveness of a civil suit, some modifications to the basic rules of civil responsibility have been suggested. For example, it has been proposed that the State be responsible for the results of any illegal acts by the police, that minimal compensation be awarded, and that a suit for damages not be limited to the person who committed the illegality but extended to cover his superiors.[64a] Most of these suggestions aim at providing adequate and speedy indemnity to the victim without excessive expense, and at penalizing not only those persons found guilty of illegal activity but also their superior officers. This, it is argued, should encourage superior officers to improve and to control the behaviour of their subordinates.[65]

The situation in Canada differs from that in the United States. As Arthur Martin describes it:

> The remedy in tort has proved reasonably effective; Canadian juries are quick to resent illegal activity on the part of the police and to express that resentment by a proportionate judgment for damages.[66]

An excellent analysis by Professor Paul Weiler[67] of police arrest practices indicates that in Canada an action for civil damages is likely to be more effective in preventing and deterring illegal police activities than a similar action in the United States. A recently published study in the United States under the auspices of the National Institute of Law Enforcement and Criminal Justice[67a] shares this view. The Canadian and American approaches to the exclusion of illegally obtained evidence were compared using statistics derived from experiences in controlling police practices in Toronto and Chicago. The study concluded that:

> The empirical studies showed not only the inequitable character of the exclusionary rule, but also the fact that the argument of its dissuasive effect does not seem to be justified. Canadian experience in the matter of action in civil responsibility suggests that another viable response exists . . .[68]

Even though the preciseness of data and sources of information for this study may be open to some criticism, it appears that Canadian courts do not hesitate to find police officers liable for substantial damages due to illegal practices constituting civil wrongs performed while acting in the course of their employment.[69]

To conclude, in the light of American experience on the one hand and Canadian tradition on the other, it would seem that the dissuasive effect of the exclusionary rule is not sufficient alone to warrant its recognition. The effect appears to be too remote, too problematical and uncertain, and too superficial to serve as a sound basis for reform proposals for these reasons:

1. It has limited scope, dealing merely with one aspect of police activity: collecting evidence in order to obtain convictions. It has no impact on crime prevention. As the Chief Justice of the United States Supreme Court observed in *Terry v. Ohio*:

> Regardless of how effective the rule may be where obtaining convictions is an important objective of the police, it is powerless to deter invasions of constitutionally guaranteed rights where the police either have no interest in prosecuting or are willing to forego successful prosecution in the interest of serving other goals.[70]

2. The person who feels the real impact of the dissuasive effect is not the police but rather the prosecutor—the Crown Attorney—who is directly influenced. It is rather artificial despite the close relationship between prosecutors and the police to put them "in the same bag" and to refuse to recognize that the prosecution does not have any legal or real control over police activities. At best, the dissuasive effect on the policeman occurs by ricochet—he does not feel the immediate effect of having evidence excluded that the Crown Prosecutor does. In order to improve police activity through dissuasion, the penalties involved should personally or financially affect the very police officer who has committed a violation of the law. Disciplinary action and civil suits are likely to have a more direct and certain result.

3. The fact that the present means of control can be criticised does not in itself justify exaggerating the dissuasive effect of an exclusionary rule. The best answer would be to seek reform or rearrangement of civil and disciplinary controls. At best, the adoption of the rule of exclusion serves merely as a weak support for other forms of control. It would appear that the price paid by society for such a rule is too high, given the indirect and uncertain benefits that perhaps may be derived from its effect on police activities.

4. The few empirical studies based on American experience fail to demonstrate any positive preventive and dissuasive impact on police conduct flowing from the use of the exclusionary rule.

Normative Arguments

The second group of basic arguments favouring a rule of exclusion are normative rather than factual. They focus essentially on philosophies underlying the criminal justice system despite the different ways in which they are expressed.[71] It can be argued that since the State recognizes a certain number of fundamental rights protected by law (for example, the right not to incriminate oneself), it should neither tolerate their violation nor allow tacit acceptance of violations by the courts.[72] Similarly, respect for the rule of law obliges the courts to reject unhesitatingly all evidence obtained through violations of the rule of law. Another argument points that in any given society, the State should make every effort to encourage and promote respect for laws and the fundamental principles of social organization which they embody. It should set the example itself. To permit the courts to receive evidence obtained in violation of the rule of law weakens the very foundations of justice, projects a bad image of the administration of justice and consequently erodes public confidence in it.

As these arguments have been expressed, consistent application of the law (due process) requires that the methods used in discovering the truth must conform to the fundamental principles and values which society wishes to protect. A democratic society recognizes that in criminal justice there are more important values than strict crime control and the punishment of criminals. Efficient crime control is secondary to maintaining these values. To force the courts to exclude evidence illegally obtained strengthens the importance of these values and exemplifies the moral and educative force of the law. Excluding illegally obtained evidence demonstrates that the role of the courts is not limited to the repression of criminal acts and stresses their role as a guardian of the rule of law and of fundamental liberties and human rights. Allowing the courts to reject illegal evidence promotes public denunciation not only of illegal acts by police officers, but also of police practices and reprehensible standards of conduct. And as this publicizes the issues, the public becomes more sensitive and aware of the issues involved. In the long run, the whole of society benefits from the effects of exclusion even though in the short run, concessions are made to efficiency and some guilty parties may well be acquitted.

There is no doubt that these various arguments are by far the most solid and convincing basis for an exclusionary rule. Perhaps they are the only real grounds

for discussion and reform initiatives. The basic philosophies of the criminal justice system are questioned because of them. A stand either for or against the rule of exclusion presupposes supporting the fundamental values of the system, at least indirectly, and opting for one or other of the two basic alternatives.

For those who feel that the main purpose of the system is crime control and the punishment of criminals, the exclusionary rule inherently contradicts such an objective. In fact, it may well permit the guilty person to escape conviction. Moreover, the person who committed the illegality (i.e. the policeman) does not have to answer directly for the consequences of his error. The net result is that society and the public pay for this double transgression of the law. Some say that large segments of the population, perhaps less aware of the fundamental nature of the problem, will lose confidence in the administration of justice if a criminal is seen to profit from the rule and is released for reasons which may be seen as no more than violations of simple technicalities. As well, the police might also be frustrated if relevant evidence, sufficient to prove the guilt of a criminal, is nullified because of a violation of a technical rule of procedure.

If, on the other hand, respect for constitutional guarantees, fundamental human rights and due process are held to be the most important values in society and thus all the rules of criminal law must not infringe on them, the perspective is very different.[73] Long term social interests must prevail and the price to be paid cannot be considered to be excessive. The State, like Caesar's wife, must be above suspicion and its courts must not lend their support even indirectly to disrespect for basic priorities. They must, as the justices of equity have said, "come to justice with clean hands". To do otherwise leaves the State in an untenable position. Having once guaranteed certain fundamental rights and encouraged respect for the law, the State could not permit the results of a violation of these rights to be used as evidence in the courts.

This aspect is especially apparent to the public when the police use distasteful and shocking methods, for example, when evidence has been extracated by severe physical brutality. In such extreme cases, the public begins to lose confidence in the judicial system and in the way it perceives fundamental constitutional rights.

These are in summary form the two principal sides of the controversy over admissibility of illegally obtained evidence. If their logical extensions are translated into proposals for reform, several positions can be taken.

1. The first is obviously the complete rejection of the rule excluding illegally obtained evidence and the maintenance of the *status quo*. The relevance of the evidence would remain the sole criterion for admissibility regardless of how the evidence was obtained. However, this position does not exclude the development of measures designed to discourage illegal practices by police officers such as suits for civil damages, disciplinary proceedings, criminal sanctions, and so on.
2. The second approach is the opposite and would begin with the legislative recognition of a rule excluding illegally obtained evidence. The scope of such a rule would be limited to evidence directly obtained or extended to cover evidence derived or resulting from illegally obtained evidence. Of

course, the measures previously mentioned to reinforce the control of illegalities could also be introduced here.

3. Finally, between these two extremes are certain intermediary solutions such as those found in Scotland, Germany, and Israel. It is, in our view, on this middle ground that Canadian law should base a solution.

CRITICISMS AND RECOMMENDATIONS

It may be noted, in reading the major writings on the subject, that the positions for and against the exclusionary rule are often supported by extreme examples. In support of the exclusionary rule, authors have referred to cases where police conduct is profoundly offensive and shocking even to the most rudimentary notions of justice. There are, for example, cases fortunately rare, where the police have pumped a suspect's stomach to recover a drug capsule swallowed when it became evident that a search was inevitable. There are also cases where the police have obtained confessions from a suspect by resorting to violence or threats repugnant to any civilized society. On the other hand, to justify the opposing position, it is easy to quote examples of a search rendered illegal because of a defect of form in the search warrant, but because of which the police had seized a large quantity of drugs and obtained evidence against a trafficker. Such cases exist and will continue to exist. It would be unrealistic to base a solution or proposals for reform on such extreme examples.

The traditional argument based on the preventive or dissuasive effect of the exclusionary rule does not appear to be persuasive in any direction. American experience does not conclusively establish that widespread adoption of the exclusionary rule has had any substantial effect on reforming police practices.[74] Moreover, all things being equal, one should consider that Canadian police forces have their own traditions, rules, practices and customs, and operate in a social milieu quite different from those of our neighbour to the south. Consequently, they are not prey to the same criticisms.

If the problem is studied from the perspective of due process, and the rule of law, the adoption of the exclusionary rule can easily be justified since it appears to be a logical and inevitable consequence of recognizing these principles. Yet it is important to clarify this argument because it might lead the legislator to seek a compromise between the two extremes. The illegalities committed in the search for evidence rarely transgress these principles. As noted in *Breithaupt v. Abram*[74a]

> Due process is not measured by the yardstick of personal reaction . . . but by that whole community sense of decency and fairness that has been woven by common experience into the fabric of acceptable conduct.

Thus, if this is so for a case of police brutality or a confession obtained through violence, the case of mere technical defaults in procedure or in the form of search warrants is quite different. Is it reasonable to argue that such defects constitute real violations of the principle of due process? Even if one does, the question remains unresolved because one still must consider whether such a violation by itself

justifies the application of the exclusionary rule. If it is reasonable for society to consider all violations of constitutional guarantees and fundamental rights as serious and subject to severe sanctions, is it reasonable to apply the sanctions in every case, non-selectively and without regard to the impact on social imperatives? The fundamental rights of citizens must be respected though, even in theory, such rights are not absolute. They are subject to other social imperatives even though the ideals which they embody are high on the scale of values important to democratic societies. The legislator himself at times has had to limit the exercise of these rights. The general rule stating that no one must incriminate himself has not stopped Canadian legislators from making motorists take mandatory breathalizer tests.

As well, this notion of respect for the rights of the individual must be seen in the general context of the criminal law which does not hesitate to justify or even to encourage violation of those rights in the name of other values. As an illustrative example, take the general principle in criminal law that everyone has the right to maintain his physical integrity and anyone who harms him commits a criminal act. Contrast this with the principle that everyone has a right to protect his right to ownership and an infringement of this right is an offence. But criminal law allows the police to use force if necessary to carry out a "legal" arrest, authorizes the police to destroy certain objects belonging to others, or "legally" to enter on property in order to search, seize and investigate. Therefore, there are within the law itself many authorized intrusions of force and thus many situations where the law has interfered with the exercise of fundamental rights.

In our opinion, the argument based on the rule of law is only effective if the illegality committed does in fact seriously offend the fundamental values recognized by society and thus shocks the public conscience. It appears neither fair nor realistic to exclude evidence indiscriminately, without any bending of the rule of law. To do so ignores the other side of the problem. The State has the right and the duty to protect and promote respect for the security of social life. Can it afford, without infringing the individual's right to live freely and securely, to let a socially dangerous individual go free merely because the evidence for one part of a crime is not admissible, when the illegality committed by the police force is a minor encroachment upon the rights of the accused? An acceptance of the exclusionary rule, without restriction and discretion, does not appear realistic to us because it would indiscriminately nullify all evidence tainted by the most trivial illegality. If the illegality does not seriously contravene a rule of law embodying a fundamental value, and if it is not the result of a deliberate offence or dishonesty, but rather is the consequence of an honest error committed in good faith, or of non-compliance with a technical rule of procedure, then the exclusion of this evidence is too high a price to pay. But in contrast, its exclusion should be the rule if the circumstances point to a serious violation of fundamental human rights, a scornful and a deliberate act by the police force or a serious violation of the free exercise of constitutional liberties and freedoms.

To make the rule absolute is to ignore the balance which hopefully exists between the citizen's right to be protected against violations of his fundamental rights and the State's interest in guarding public security by detecting and punish-

ing crime. It demonstrates a lack of perspective in approaching this problem by attaching more importance to the slightest infringement by the police of the rules of the game than to more serious violations of public order by criminals.

Thus, the exclusionary rule should always be considered in light of the nature of a violation and what it means for social values. The adoption of an arbitrary and general rule of exclusion for all illegally obtained evidence would encourage two sorts of reactions which would seriously outweigh the very advantages sought.

First, it would lead to a loss of public confidence in the administration of justice. The public might accept a guilty party getting "off the hook" because the police have seriously contravened the rule of law but it will lose faith in the administration of justice if the acquittal is due to breaking a minor technical rule. Second, the police may in many cases feel unable to perform their role of helping to convict criminals, will lose confidence in their performance and resort to other tactics such as harassing suspected persons or imposing illegal controls or punishments.

In our opinion, the public's confidence in the exercise of the judicial function relies more on the enlightened application of discretionary power than on a simple application of an absolute rule. The practical inconveniences—so evident in the United States surrounding the adoption of the exclusionary rule—can only be put up with in the cases where the illegality seriously violates basic rights and interests. It is therefore by taking several special factors into account that the choice between exclusion and admission of evidence should be made, the most important one being the seriousness of the right violated by the illegal act. To achieve this objective, it is absolutely necessary to make the rule relative and to give discretionary power in its application to the courts.

In the past, when this kind of suggestion was put forward, for example in the Ouimet Report[75], several objections were raised. The strongest of these avered that granting such discretionary power to a judge would lead to arbitrariness, to legal chaos, contradictory decisions, and thus to uncertainty.[76] However, this objection does not appear to be all that serious. Past experience indicates that the legislator has often trusted the capacity of judges to exercise discretionary power and the uniformity of application of legal rules has not been visibly undermined. In fact, there is an undeniable advantage in granting judges discretionary power, since it keeps the courts continually in touch with current social attitudes and may lead to the eventual evolution of the rules as the courts adapt them to changing social realities. It gives to the courts the role of guardians of the public's freedom. Evidently there are disadvantages in the slow pace of legal evolution and in the almost reverential attitude towards precedents; but it may be possible to overcome this by improving the manner in which discretionary powers are exercised.

Another objection to this solution is that society's desire to punish criminals and control crimes can only be translated into real events by abolishing the exclusionary rule.[77] However, this argument is simplistic, based as it is on the view that society places the repression of crime above all other values. Even without an exclusionary rule, our courts throughout their history have never hesitated to

denounce abuses and to maintain a high standard of justice, although the solutions they have reached have not always been popular.

A further objection is that judicial discretion would harm the administration of justice because, when preparing for a trial, the prosecution would be able to predict more or less what evidence would be allowed and what would not.[78] However, we do not think this is a compelling argument.

In order, however, to reduce the inherent difficulties in the exercise of any legal discretionary power and to a certain extent avoid the danger of too great a disparity between legal decisions, the legislator should indicate the criteria that should be applied in the exercise of discretion and set out guidelines for general use of such powers. Proposals in Canada[79], the United States[80], and other countries[81] have endorsed this approach and described the criteria which should be involved. The first of these focuses on the nature and degree of the illegality committed—the more serious the illegality, the more the court should be strict in not admitting it as evidence. To distinguish between an illegality resulting from a failure to comply with a substantive rule and one resulting from a violation of a rule of form or procedure does not appear to us to be appropriate. Although it is likely that, in most instances, infringements of the rules of form or procedure are less serious than violations of substantive rules, it need not be so in all cases. Moreover, negligible violations of a substantive rule may also exist. Here, the court should ask itself if, objectively, the illegality is serious because it infringes a fundamental right or the principle of due process or because it contravenes a recognized constitutional right.

The second criterion concerns the conduct of those gathering the illegally obtained evidence. The supporters of judicial discretionary power differentiate between illegal conduct in good faith and illegal conduct in bad faith. This criterion is especially appropriate in considering the dissuasive effect of an exclusionary rule. However, it is necessary to recognize, strictly on an evidentiary level, that good or bad faith is difficult to establish since it is above all a question of an individual's intentions. It is easier instead to consider the voluntary or deliberate nature of the act and thus separate excessive, conscious and voluntary illegal conduct from "innocent" and frank omission or failure to obey a rule of law. Measuring the extent of deviation from required legal conduct in the circumstances of the case may also determine the degree of illegal behaviour. As the Ouimet Report suggests[82], perhaps one ought to take into account the circumstances at the moment when the act was committed. Thus, if the situation were urgent and measures requiring action to avoid the destruction of evidence were called for, the judge should be more lenient when evaluating the illegal conduct.

A third factor deserving the attention of the court is the nature of the criminal charge. Indeed, given an equal degree of illegality, the more serious the crime of which a person stands accused, the more the court should hesitate to exclude illegally obtained evidence. The judge should be aware of the consequences for society of freeing a person charged with committing an offence of a serious nature.

A combination of these different criteria is a sound basis for a judge's exercise of discretionary power. Legislative reform should include, first of all, a general

provision enunciating the rule laid down by the Ontario Court of Appeal in *Wray*; the scope of which has been considerably narrowed by the Supreme Court of Canada's decision on appeal. In our opinion, the opportunity should be taken to reinstate the rule (as it was thought to exist at common law before the Supreme Court decision in *Wray*) that the judge can always exclude evidence regardless of its nature and the other criteria for exclusion, provided its admission would cause serious injustice to the accused, or discredit the administration of justice besides having tenuous relevance as evidence. It seems to us, given the technicality of the law of evidence in general, that such a measure can only reinforce the fairness and justice of the criminal law.

To summarize, in our opinion, reform proposals should have the following objectives:

1. To recognize as a basic principle that an irregularity in obtaining evidence is not in itself a reason for exclusion if the evidence in question meets the other conditions for admissibility such as relevance and credibility;

2. To advocate legislation which allows a judge to exercise a discretion to depart from this basic principle and refuse to admit evidence obtained through a serious violation of a substantive law or fundamental right if, considering the circumstances and the gravity of the charge against the accused, the violation is the result of a deliberate voluntary act committed in bad faith, its admission would constitute a serious injustice to the accused or bring the administration of justice into disrepute; furthermore, as a possible expansion to this judicial discretion, to give the judge the power simply to dismiss the charge against the accused.

These suggestions could be accompanied by general measures reinforcing disciplinary procedures and civil actions in order to ensure that the citizen is better protected from harm or damages caused by the illegal acts of enforcement agencies.

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ENDNOTES

1. In light of the abundance of legal literature on this topic the reader is referred to the selective bibliography given at the end of the present study.
2. *Ibrahim v. Rex*, (1914) A.C. 599.
3. *Boudreau v. The King*, (1949) S.C.R. 262, (1949) 7 C.R. 427, (1949) 96 C.C.C. 1, [1949] 3 D.L.R. 81.
4. *Attorney-General for the Province of Quebec v. Bégin*, (1955) R.C.S. 593, 21 C.R. 217.
5. See: *R. v. Wray*, [1971] S.C.R. 272, (1970) 4 C.C.C. 1, (1970) 11 C.R.N.S. 235, (1970) 11 D.L.R. (3rd) 673. On the specific problems raised by confessions: Freeman, S., *Admissions and Confessions* in *Studies in Canadian Criminal Evidence* (Toronto, 1972) and Roberts, D., *The Legacy of Regina v. Wray*, (1972) 50 Can. Bar Rev. 19.
6. *R. v. Wray*, [1971] S.C.R. 272, (1970) 4 C.C.C. 1, (1970) 11 C.R.N.S. 235, (1970) 11 D.L.R. (3rd) 673.
7. *Kuruma v. The Queen*, (1955) 1 All E.R. 236, (1955) A.C. 197.
8. *Noor Mohamed v. The King*, (1949) A.C. 182.
9. *Callis v. Gunn*, (1964) 1 Q.B.R. 495.
10. *R. v. Doyle*, (1886) 12 O.R. 347.

10a. For example: *R. v. Gibson*, (1919) 1 W.W.R. 614 (S. Ct, Alta.); *R. v. Kostachuck*, (1930) 2 W.W.R. 469 (S. Ct, Sask.); *R. v. Paris*, (1957) 118 C.C.C. 405 (Qué. C.A.).

11. *R. v. St. Lawrence*, (1949) O.R. 215, (1950) 7 C.R. 464.
12. *Supra*, note 4.
13. *Supra*, note 7.

13a. Attorney General of Quebec v. Bégin (1953) S.C.R. 593, 602.

14. *Supra*, note 5.
15. Notably: Jodouin, A. (1970) 1 Rev. Gén. Dr. 390; McDonald, B. (1971) 29 U. of T. Fac. Rev. 99; Roberts, D. (1972) 50 Can. Bar Rev. 19; Sheppard, A. (1972) 14 Crim. L. Q. 334.
16. *R. v. Wray*, (1970) 9 C.R.N.S. 131, 133: " . . . a trial judge has a discretion to reject evidence even of substantial weight if he considers that its admission would be unjust or unfair to the accused or calculated to bring into disrepute the administration of justice . . . "
17. *Supra*, note 11.
18. *Supra*, note 7.
19. *R. v. Wray*, (1971) S.C.R. 272, 292-293.
20. *Id.*, 300-301.
21. *Id.*, 275, 301-304.
22. *DeClercq v. The Queen*, (1968) S.C.R. 902, (1969) 1 C.C.C. 197, (1969) 70 D.L.R. (2d) 530.
23. *R. v. Wray*, (1971) S.C.R. 272, 279 ff.
24. *Id.*, 280.
25. *Id.*, 304.

25a. *See* note 28 *infra*.

26. *See* in this regard the criticism made by Martland J., in the *Wray* case, *supra* note 19 at 294 ff.

    In the *Kuruma* case, in fact the knife allegedly found on the accused was never produced in evidence, no witness was present when the search was ordered, and the magistrate who had pronounced judgment had not taken into account the advice of the assessors with whom he sat.

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See also the criticism by Williams, G., *The Exclusionary Rule under Foreign Law: England*, (1961) 52 J. Crim. L.C. & P.S. 272, 273ff.

27. *R. v. Barker*, (1941) 2 K.B. 281. See McDonald, B., *supra* note 15, 100.

28. See *supra* note 15, Sheppard, A., 349ff; Roberts, D., 29ff., Jodouin, A., 394.

29. *R. v. Lafrance*, (1972) 19 C.R.N.S. 80.

30. *R. v. Pettipiece*, (1972) 7 C.C.C. 133. On a second appeal, 17 Apr. 1973, the B.C. Court of Appeal considered itself bound by *Wray* (decision unreported). *See also R. v. Delco*, (1972) 18 C.R.N.S. 261 (Ont. County Ct.).

31. "Law modifying the Criminal Code, the Law on Crown Liability and the Law on Official Secrets."

32. See Beck, S., *Electronic Surveillance and the Administration of Criminal Justice*, (1968) 46 Can. Bar Rev. 643, 649 where the author cites in addition to this subject an extract from the work of Dash, S., *Eavesdropping*, to this effect.

33. Legal literature on the question is profuse. Apart from the classic texts on the subject such as McCormick, E., *Evidence* (4th ed.), 982-1082; Wigmore, *Evidence* (vol. 8), no. 2183-2189; for a comprehensive view of the question the reader is referred to the following: Sowle, C., *The Exclusionary Rule Regarding Illegally Seized Evidence*, (Chicago, 1962); Allen, A., *The Exclusionary Rule in the American Law of Search and Seizure*, (1961) 52 J. Crim. L.C. and P.S. 246; Oaks, J., "Studying the Exclusionary Rule in Search and Seizure", (1969-70) 37 U. of Chi. L. Rev. 665; Paulsen, M., *The Exclusionary Rule and Misconduct by the Police*, (1961) 52 J. Crim. L.C. & P.S. 255; Pitler, R., *Fruit of the Poisonous Tree: A Plea for a Relevant Criteria*, (1967) 155 U. Pen. L. Rev. 1136; *Fruit of the Poisonous Tree Revisited and Shepardized*, (1968) 56 Cal. L. Rev. 579; *Exclusionary Rule in Search and Seizure: Examination and Prognosis*, (1972) 20 Kan. L. Rev. 768. *See also* for a short but precise résumé of the state of the American law on the subject; Heydon, J., *Illegally Obtained Evidence*, (1973) Crim. L. Rev. 603, 610 ff.; Gibson R., *Illegally Obtained Evidence*, (1973) U. of T. L. Rev. 23.

34. *Weeks v. U.S.*, 232 U.S. 383 (1914).

35. *Wolf v. Colorado*, 338 U.S. 25 (1949).

36. *Mapp v. Ohio*, 367 U.S. 643 (1961).

37. Boyd v. U.S., 116 U.S. 616 (1886); *Adams v. New York*, 192 U.S. 585 (1904).

38. *Supra*, note 34.

39. *Supra*, note 35.

40. *Supra*, note 36.

41. *See Silverman v. U.S.*, 365 U.S. 505 (1961); Wong Sun v. U.S., 371 U.S. 471 (1973).

42. *See supra* note 33, Heydon, 611; Wigmore; McCormick.

43. *See* Among others: McGarr, F., *The Exclusionary Rule: An Ill-Conceived and Ineffective Remedy*, (1961) 52 J. Crim. L.C. & P.S. 266; La Fave, R., *Controlling the Police: The Judge's Role in Making and Reviewing Law Enforcement Decisions*, (1965) 63 Mich L. Rev. 987; Oaks, J., *Studying the Exclusionary Rule in Search and Seizure*, (1970) 37 U. Chi. L. Rev. 665; Wingo, H., *Growing Dissillusionment with the Exclusionary Rule*, (1971) 25 S.W.L.J. 573; Wright, J., *Must the Criminal go Free if the Constable Blunder?*, (1972) 50 Tex. L. Rev. 736; Hoening, R. and Walker, L., *The Tort Alternative to the Exclusionary Rule in Search and Seizure*, (1972) 63 J. Crim. L. 256. One must also note the opposition of Chief Justice Burger of the United States Supreme Court: *Bivens v. Six Unknown Named Agents*, 403 U.S. 388 (1971).

    Cf: Little, C.D., *The Exclusionary Rule of Evidence as Means of Enforcing 4th Amendment Morality on Police*, (1970) 3 Ind. Legal Forum 309; Pitler, R., *Decline of the Exclusionary Rule: An Alternative to Injustice*, (1972) Sw. U.L. Rev. 68; Spiotto, J., *Judicial Integrity and Judicial Review: An Argument for Expanding the Scope of the Exclusionary Rule*, (1973) U.C.L.A. L. Rev. 1129; *See also: infra* note 80.

44. *Infra*, at 11ff.

45. On the topic in English law *see* among others: Cross, R., *Evidence*, (3rd ed.) 262; Williams, G., *Evidence Obtained by Illegal Means*, (1955) Crim. L. Rev. 339; *The Exclusionary Rule Under Foreign Law: England*, (1961) 52 J. Crim. L.C. & P.S. 272; Heydon, J., *Illegally Obtained Evidence*, (1973) Crim. L. Rev. 603; *Gibson, R., Illegally Obtained Evidence*, (1973) U. of T. L. Rev. 23 at 26ff.

46. *Kuruma v. The Queen*, [1955] All E.R. 236; [1955] A.C. 197. *See also R. v. Warickshall*, 168 E.R. 234.

47. *Kuruma v. The Queen, id.* at 239.

48. *Id.*, at 236.

49. Id.

50. *See Callis v. Gunn*, [1949] 1 Q.B. 495.

51. *Supra.*

52. *R. v. Leathan*, (1861) 8 Cox. C.C. 498, 501.

53. On Scottish and Irish law, see among others: Cross, R., *Evidence* (3rd ed.) 262; Heydon, J., *Illegally Obtained Evidence*, (1973) Crim. L. J. 603, 607; Gray, J., *The Admissibility of Evidence Illegally or Unfairly Obtained in Scotland*, (1966) 11 Jur. Rev. 89; Murray, L., *Admissibility of Evidence Illegally Obtained*, (1958) Scot. L. Rev. 73.

54. *Lawrie v. Muir*, [1950] S.L.T. 19.

55. Heydon, J., *Illegally Obtained Evidence*, (1973) Crim. L. J. 603, 608 ff. and cases cited therein.

56. Bouzat, P., *La Loyauté dans la recherche des preuves*, in Mélanges Hughency (1964) 155; Levasseur, G., *Les nullités de l'instruction préparatoire* in Mélanges Patin (1962), 469; Chambon, L., *Les nullités substantielles ont-elles leur place dans l'instruction préparatoire?* D-1959-1170; Robert, J. M., *Nullités de procédure pénale et bonne administration de la justice*, D-1971, Chr. 85; Vouin, R., *The Exclusionary Rule Under Foreign Law: France*, (1961) 52 J. Crim. L.C. & P.S. 275; Bouzat, P. and Pinatel, P., *Traité de droit pénal et de criminologie*, (2 éd. 1970), vol. 2, 1241 ff, no. 1301 ff; Merle, R. and Vitu, A., *Traité de droit criminel*, (1967) no. 1055, 991 ff.

57. Clemens, W., *The Exclusionary Rule Under Foreign Law: Germany*, (1961) 52 Crim. L.C. & P.S. 277.

58. Cohn, H., *The Exclusionary Rule Under Foreign Law: Israel*, (1961) 52 J. Crim. L.C. & P.S. 282.

59. Among the numerous documents on the subject one must point out the following studies in particular: Gunther, M., *The Exclusionary Rule in Context*, (1972) 50 N. Car. L. Rev. 1049; Hoenig, R. and Walker, L., *The Tort Alternative to the Exclusionary Rule in Search and Seizure*, (1972) 62 J. Crim. L. 256; McGarr, F., *The Exclusionary Rule: An Ill-Conceived and Ineffective Remedy*, (1961) 52 J. Crim. L.C. & P.S. 266; Nagel, F., *Testing the Effects of Excluding Illegally Seized Evidence*, (1965) Wisc. L. Rev. 283; Oaks, J., *Studying the Exclusionary Rule in Search and Seizure*, (1969-70) U. Chi. L. Rev. 665; Paulsen, M., *Exclusionary Rule and Misconduct by the Police*, (1961) 52 J. Crim. L.C. & P.S. 255; Patenaude, P., *De l'admissibilité devant les tribunaux civils des preuves illégalement obtenues*, (1973) R. du B. 27; Pitler, R., *Fruit of the Poisonous Tree; A Plea for Relevant Criteria*, (1967) 115 U. Pen. L. Rev. 1136; Spiotto, J., *Judicial Integrity and Judicial Review: An Argument for Expanding the Scope of the Exclusionary Rule*, (1973) 20 U.C.L.A. L. Rev. 119; *Search and Seizure, an Empirical Study of the Exclusionary Rule and Its Alternative*, (1973) 2 J. Legal Studies 234; Wingo, H., *Growing Disillusionment with the Exclusionary Rule*, (1971) 25 Sw. L.J. 573.

60. Wigmore, *supra* note 33, no. 21849.

61. *Mapp v. Ohio*, 367 U.S. 693 (1961).

62. Oaks, J., *Studying the Exclusionary Rule in Search and Seizure*, (1969) U. Chi. L. Rev. 665.

63. Oaks, J., *id.*, 678ff. Spiotto, J., *The Search and Seizure Problem: Two Approaches: The Canadian Tort Remedy and the U.S. Exclusionary Rule*, (1973) 1 J. of P.S. & A. 36; *Search and Seizure: An Empirical Study of the Exclusionary Rule and its Alternatives*, (1973) 2 J. Legal Studies 243. *See also* Kate, L., *The Supreme Court and the State: an Inquiry into Mapp v. Ohio in North Carolina*, (1966) 45 N. Car. L. Rev. 119; Nagel, R., *Testing the Effects of Excluding Illegally Seized Evidence*, (1965) Wisc. L. Rev. 283.

64. In this regard *see* particularly Wingo, H., *Growing Disillusionment with the Exclusionary Rule*, (1971) 25 Sw. L. J. 573, 577ff. *Also* Paulsen, M., *The Exclusionary Rule and Misconduct by the Police*, (1961) 52 J. Crim. L.C. & P.S. 255, 257.

64*a*. *See* the opinion of Chief Justice Burger, in *Bivens v. Six Unknown Federal Narcotics Agents*, 403 U.S. 388 (1971) at 422ff.

65. *See* among others Oaks, J., *supra* note 59 at 665; Paulsen, M., *The Exclusionary Rule and Misconduct by the Police*, (1961) 52 J. Crim. L.C. & P.S. 225, 260; Wingo, H., *Growing Disillusion-*

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66. Martin, A., *The Exclusionary Rule Under Foreign Law: Canada,* (1961) 52 J. Crim. L.C. & P.S. 271.

67. Weiler, P., *The Control of Police Arrest Practices: Reflections of a Tort Lawyer,* in Studies in Canadian Tort Law, (1968) at 416.

67a. Of the law enforcement Assistance Administration of the United States Department of Justice.

68. Spiotto, J., *The Search and Seizure Problem: Two Approaches: The Canadian Tort Remedy and the U.S. Exclusionary Rule,* (1973) 1 J. P.S. & A. 36 at 49.

69. *For Example, Chaput v. Romain,* [1955] R.C.S. 834; *Lamb v. Benoit* [1959] R.C.S. 321. *See also* Giroux, L., *Municipal Liability for Police Tort in the Province of Quebec,* (1970) 11 Ca. de Dr.

70. *Terry v. Ohio,* 393 U.S. 1, p. 14 (1968) also Burger, W., *Who Will Watch the Watchman?,* (1971) 14 Am. U.L. Rev. 1.

71. In this regard *see* especially Oaks, J., *supra* note 59 at 665 and McGarr, F., *The Exclusionary Rule: An Ill-Conceived and Ineffective Remedy* (1961) 52 J. Crim. L.C. & P.S. 266; Paulsen, M., *supra* Note 64 at 255; Patenaude, P., *De l'admissibilité devant les tribunaux civils des preuves obtenues illégalement,* (1973) 33 R. du B. 27.

72. This argument, defended in the United States by reference to 5th and 14th Amendments to the American Constitution, may be transposed to Canada because of the existence of the Canadian Bill of Rights, R.S.C. 1970 c. 44.

73. As one author notes, Rawls, J., *A theory of Justice,* (1972) at 239: "The principle of legality requires the regular application of the law in a manner which conforms to other ends, that of pure and simple discovery of the truth".

74. *Supra,* at 27 ff.

74a. *Breithaupt v. Abram,* 352 U.S. 432, at 436 (1957).

75. *Report of the Committee on Corrections,* (1969) at 79ff.

76. For this *see,* Pitler, A., *Fruits of the Poisonous Tree, a Plea for Relevant Criteria,* (1967) 115 U. Pen. L. Rev. 1136, at 1148; *Fruits of the Poisonous Tree Revisited and Shepardized,* (1968) 56 Cal. L. Rev. 579, at 583 ff.

77. See Pitler, (1967) 115 U. Penn. L. Rev. 1136 at 1148.

78. *See* the analysis of Mewett, A., *Law Enforcement and the Conflict of Values,* (1970) 16 McGill L.J. 1, at 5.

79. For Canada *see* in particular, Beck, S., *Electronic Surveillance and the Administration of Criminal Justice,* (1968) 46 Can. Bar Rev. 643; MacDonald, B., (1971) 29 U. of T. L. Rev. 99; Sheppard, A., *Restricting the Discretion to Exclude Admissible Evidence, an Examination of R. v. Wray,* (1971) 14 Crim. L.Q. 334; Mewett, A., *Law Enforcement and the Conflicts of Values,* (1970) 16 McGill L.J. 1, 17; Gibson, R., *Illegally Obtained Evidence,* (1973) U. of T. Fac. L. Rev. 23, 36ff.

80. For the U.S., *see* Wingo, H., *Growing Disillusionment with the Exclusionary Rule,* (1971) 25 Sw. L.J. 573. This is the solution proposed elsewhere: *see* Model Code of Pre-Arraignment Procedure, s.8-02 (1971-Tentative Draft), S-881, 93rd Cong., 1st Session (1973). *See Exclusionary Rule Wins Approval,* (1973) 59 A.B.A.J. 387 which contains a criticism by the American Bar Association of this model code.

81. *Supra* at 23.

82. *Report of the Committee on Corrections,* (1969), 80.

LAW REFORM COMMISSION

COMMISSION DE RÉFORME DU DROIT

EVIDENCE

11. CORROBORATION

A study paper prepared by the
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K1A 0L6

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INTRODUCTION

As a general rule the common law has developed on the basis that the testimony of a single competent witness is sufficient in law to support a verdict. However, principally within the last one hundred years, by statute, and in part by judicial decision, a number of exceptions to this general rule have been created.

Under the present law an accused cannot be convicted on the strength of the testimony of an unsworn child or of a victim of certain sexual offences unless the testimony of these witnesses is corroborated. With respect to other types of witnesses, accomplices, children who give sworn testimony, and victims in certain other sexual offences the jury must be cautioned by the judge that although they might convict on the basis of the testimony of these witnesses, it is dangerous to do so unless their testimony is corroborated. Finally, under the present law the testimony of only one witness is insufficient to sustain a conviction for perjury, treason and forgery. We recommend the abolition of all of these exceptions to the general rule that the evidence of a single competent witness is sufficient in law to support a verdict.

Historically the common law excluded much relevant evidence from judicial trials because of a fear that the evidence might be fabricated and because of a distrust of a jury's ability to evaluate it. For example, convicts, parties and interested persons were at one time all excluded from giving evidence because they were considered untrustworthy. This fear of fabricated evidence and distrust of the jury's ability to evaluate evidence was rightfully rejected in the middle of the eighteenth century and the factors that at one time affected a witness' competence to give evidence now only affect his credibility. (See Study Paper No. 1, Competence and Compellability.) This change in the rules of evidence reflected the basic principle upon which any rational system of evidence must be premised: All relevant evidence is admissible unless strong and compelling reasons demand its exclusion. This principle runs throughout all of our study papers.

Many of the most common and important requirements for corroboration or a cautionary instruction are justified on the same grounds that the ancient rules with respect to the incompetence of witnesses were justified. Namely, that the testimonies of for instance accomplices, children and victims in sexual offences is for one reason or another likely to mislead the jury. Therefore their testimony must be corroborated before it can be left for the jury to evaluate. Again, a theme that runs throughout the proposals in our study papers is that we should not premise a system of evidence on the assumption that all jurors are ignoramuses and without experience in evaluating evidence and making judgments. It is easily proved that

jurors are much more sophisticated and educated now than they were when the rules of evidence were first formulated. Whether they are now capable of evaluating the type of evidence that presently calls for corroboration can only be given a more speculative answer. However, the only empirical study of note in this area concluded not only that the jury follows and understands the evidence as well as the judge but also that the jury and the judge did not disagree significantly in determinations involving the credibility of witnesses. In particular it was found that the jury was as cautious as the judge in evaluating the testimony of young children in sex cases and the testimony of accomplices. H. Kalven and H. Zeisel, *The American Jury,* chs. 11, 13 (1966). Surely this simply confirms common sense. Most jurors will be familiar with the testimonial frailties of children, victims in sexual offences and accomplices, and if they are not, and they are not readily apparent to them, counsel will undoubtedly bring them to their attention.

The rules requiring that the testimony of certain types of witnesses be corroborated or that the jury be instructed that it is dangerous to convict on the basis of their testimony alone, are particularly difficult to justify in light of the fact that the testimony of every other witness, irrespective of how badly his credit has been impeached, is left to the jury and a verdict can be returned on the basis of it alone. Furthermore it is questionable whether one can rationally provide a fixed evaluation of a witness' testimony depending simply on whether that witness fits within a certain class of person. The Project tends to agree with Chief Baron Joy who in his monograph, Evidence of Accomplices, (1844), in commenting on a practice that had developed, perhaps in Ireland, of not sending cases to the jury when it was founded on the uncorroborated testimony of an accomplice, wrote:

> That a judge should come prepared to reject altogether the testimony of a competent witness as unworthy of credit, before he had even seen that witness; before he had observed his look, his manner, his demeanour; before he had an opportunity of considering the consistency and probability of his story; before he had known the nature of the crime of which he was to accuse himself, or the temptation which led to it, or the conviction with which it was followed; that a judge, I say, should come prepared beforehand, to advise the jury to reject without consideration such evidence, even though judge and jury should be perfectly convinced of its truth, seems to be a violation of the principles of common sense, the dictates of morality, and the sanctity of a juror's oath.

These remarks are equally apt to the present practice of requiring corroboration or warning triers of fact that it is dangerous to convict in the absence of corroboration. Considering the endless diversity in the credit of witnesses a fixed rule estimating in advance the worth of a particular witness ought to be imposed with great caution and only when we are satisfied that a particular class deserves such blanket condemnation. The proponent of a deviation from the normal method of examining the credit of each witness on an individual basis thus needs to satisfy a heavy burden. Similarly, the proponent of a rule requiring an absolute quantity of evidence prior to conviction of a particular crime has the burden of establishing the need for such discriminatory treatment; why it is permissible to convict a person of murder on the testimony of a single uncorroborated witness and not permissible to convict a person of forgery, for instance, on like evidence.

A danger of the corroboration requirement is that it might produce, as suggested by Wigmore, reliance upon a rule of thumb. Wigmore asserted "(The Requirement) seems but a crude and childish measure, if it be relied upon as an adequate means for determining the credibility of the complaining witness in such charges . . . . This statutory rule . . . tends to produce reliance upon a rule of thumb." Wigmore, Evidence, para. 2061 (3d. ed. 1940). No rule of thumb for determining factual issues is a substitute for a thorough exploration of the credibility of a witness by carefully scrutinizing all the factors that might impair the worth of his testimony. If a witness' credibility appears good, and his testimony is believed by the trier of facts, that alone should be sufficient to support a verdict. If a witness' credibility is in doubt the mere presence of corroborative evidence should not lead to its unquestioned acceptance. Not surprising to many perhaps, an empirical study done in England tends to suggest that if a jury is given the present cautionary instruction on the danger of convicting on uncorroborated evidence, they will be more likely to convict than if they had not received any special instruction. L. S. E. Jury Project, Juries and the Rules of Evidence, [1973] Crim. L. R. 208.

Aside from the likely false assumptions upon which our present rules of corroboration rest, the futility of estimating the credit of a proposed witness simply by placing him in a broad category, and the dangers of a strict corroboration requirement, a case for the abolition of the present rules can be supported by their sheer complexity. The rules have provided a fertile field for technical appeals of questionable merit. The classic definition of corroboration in criminal cases is that given by Lord Reading C.J. in *R. v. Baskerville,* [1916] 2 K.B. 658, 667:

> We hold that evidence in corroboration must be independent testimony which affects the accused by connecting or tending to connect him with the crime. In other words, it must be evidence which implicates him, that is, which confirms in some material particular not only the evidence that the crime has been committed, but also that the prisoner committed it.

This judicial expression has all the force of a statute in Canada and together with later judicial glosses we have moved from a wise practice of viewing the evidence of some witnesses with circumspection to a complex technical rule filled with pitfalls for the unwary. It is beyond the dimensions of this paper to fully illustrate the enormous superstructure that has been erected on the original basic proposition that the evidence of some witnesses should be approached with caution. A thorough reading of any of the Canadian articles in this area will reveal the subtleties, variations, inconsistencies, and great complexities that have emerged from the case law in this area. See for example, Branca, Corroboration, in Salhany, R.E., and Carter, R.J., Studies in Canadian Criminal Evidence 133 (1972); Mahoney, Corroboration Revisited, in Canadian Bar Association, Studies in Criminal Law and Procedure 133 (1973); Savage, Corroboration, 6 Crim. L. Q. 159, 282 (1963-64).

In the remainder of this paper we will briefly review the law with respect to the testimony of accomplices, victims in sex cases, children and the requirements of corroboration for the offences of perjury, treason and forgery.

ACCOMPLICES

Beginning in the 18th century English trial judges commonly warned the jury of the particular weakness inherent in the testimony of accomplices. As noted by Lord Abinger in *R. v. Farler,* (1837) 173 E.R. 418:

> It is a practice which deserves all the reverence of the law, that judges have uniformly told juries that they ought not to pay any respect to the testimony of an accomplice unless the accomplice is corroborated in some material circumstance . . . . The danger is, that when a man is fixed, and knows that his own guilt is detected, he purchases immunity by falsely accusing others.

This practice became a rule of law only in this century. *R. v. Baskerville, supra; Davies v. D.P.P.* [1954] A.C. 378 (H.L.); *Gouin v. R.* [1926] S.C.R. 539. Under the present law when there is evidence in the case that a witness testifying for the prosecution might be found to be an accomplice the trial judge is required to instruct the jury that it is within their legal province to convict but that it is dangerous to convict on the uncorroborated testimony of an accomplice. He may also advise them not to convict upon such evidence. This rule must be followed with almost mathematical precision without regard to the nature of the charge, the circumstances of the case, or the personality of the accomplice. Thus, while it was discretionary for the individual judge in the 19th century to give some form of warning, it became in the 20th century mandatory for the judge to give a warning of a certain content; a conviction following a failure to give such a warning will almost invariably be quashed on appellate review.

It is a question of law for the trial judge to determine, whether the witness might be an accomplice for the purposes of the rule and a question for the jury whether he is in fact an accomplice. *R. v. Gauthier* (1954) 108 C.C.C. 390 (Ont. C.A.). It will be a defect fatal to the conviction if the trial judge fails to elaborate for the jury as to who in law could be an accomplice and to direct their attention to facts which would support such a finding with respect to certain witnesses. *MacDonald v. The King* [1947] S.C.R. 90, 94; *Vigeant v. The King* [1930] S.C.R. 396, 399. The question of who in law can be an accomplice for the purpose of the rule has produced considerable case law and has not yet been satisfactorily resolved.

The mandatory requirement that a caution be given in all cases involving accomplice testimony can be criticized for a number of reasons: the caution that must be given to the jury can in some cases become so complicated that juries probably have great difficulty understanding it, with the result that it impedes rather than assists rational deliberation on the evidence; the complexity of the required instruction also means that judges themselves frequently make errors with respect to the instruction and technical appeals result; in many cases the motives that might

lead an accomplice to give false evidence are not present in the case, and yet the cautionary instruction is still required; the rule assumes that jurors will be misled by the testimony of an accomplice who has a motive to lie, but will not be misled by the testimony of another witness who is not an accomplice, even though such a witness may have an even more compelling but obscure motive to lie.

VICTIMS IN SEX CASES

An accused cannot be convicted of the following offences upon the testimony of only one witness, usually the victim, unless such testimony is corroborated: sexual intercourse with the feeble minded, incest, seduction, sexual intercourse with step-daughter etc. or female employee, procuring defilement, procuring, and procuring a feigned marriage. Criminal Code, R.S.C. 1970, ch. C-34, s. 139(1), 195(3), 256. In cases involving the following offences if the only evidence implicating the accused is the testimony of the victim the judge must instruct the jury that ". . . it is not safe to find the accused guilty in the absence of . . . corroboration, but that they are entitled to find the accused guilty if they are satisfied beyond a reasonable doubt that her evidence is true.": rape, attempt to commit rape, sexual intercourse with a female under fourteen, and indecent assault on a female. Criminal Code, R.S.C. 1970, ch. C-34, s. 142.

It is difficult to discern any rationale underlying the different stringencies of proof for the various sexual offences in the Criminal Code. We will deal with them together, using rape as an illustration.

A number of justifications have been put forward by the courts and commentators justifying the need in rape cases for corroboration or at least a mandatory caution to the jury in the absence of corroboration. Firstly, it is argued that false accusations of rape are much more frequent than untrue charges of other crimes. A woman, it is said, may accuse an innocent man of raping her: because having consented to intercourse she then feels ashamed of herself and bitter at her partner; in order to protect her name or reputation if it becomes known that she had intercourse with the accused; for purposes of blackmail, jealousy, revenge or notoriety. But as well as being prone to deliberately fabricating rape charges it is assumed that women are susceptible to fantasize about rape, and often confuse a fantasized attack with a real one. Secondly, it is alleged that in sexual offences the defence may lack supporting evidence for its side of the story, an allegation of rape, it is contended, is hard to disprove. Finally, there is a fear that the emotion of outrage that is occasioned by the nature of sexual offences often endangers the presumption that an accused is assumed innocent until proven guilty. The jury may convict the accused solely because of the sympathy it feels towards the victim.

The English Criminal Law Revision Committee, although they recommended that no mandatory requirement for a warning should apply in the case of the testimony of an accomplice, concluded that special precautions should be retained in sexual offences. In justifying the distinction between its suggested reform with respect to accomplices and victims in sex cases the Committee noted:

> . . . the reason for the requirement in sexual cases is quite different from that in the case of an accomplice. In sexual cases it is the danger that the complainant may have made a false accusation owing to sexual neurosis, jealousy, fantasy, spite or a girl's refusal to admit that she consented to an act of which she is now ashamed. In the case of an accomplice any special danger that there may be in relying on the witness' evidence is apparent from the fact that he is an accomplice or it can be easily made apparent by the defence. In the case of a sexual offender the danger may be hidden. Moreover the nature of the evidence may make the jury too sympathetic to the complainant and so prejudice them against the accused.
>
> (Report on Evidence (General) 1972, Amnd. 4991, paras. 186-188)

This proposal was made despite the recognition that in many instances sexual offences are committed in circumstances in which corroboration is difficult or impossible to obtain and that the character and credibility of the complainant may vary infinitely from case to case. We are not persuaded that the defects in a complainant's testimony are so well hidden and immune from defense efforts to make them apparent that the distinction ought to be made. Indeed, if these defects are hidden as well as the Committee suggests it is difficult to justify the branch of the existing warning that tells a jury that it may convict if it believes the witness.

But even apart from the danger that the jury might be misled by the testimony of the victim in a rape case, recent research suggests that the assumptions underlying the requirement, the frequency of false charges due to psychological disturbances in females, and the fear that the jury will be sympathetic to the victim in a sex case and thus predisposed to convict the accused, are false. Most of the recent studies are conveniently collected and discussed in Comment, The Rape Corroboration Requirement: Repeal Not Reform, 81 Yale Law Journal 1365 (1972). For further references see Chappell, Geis, Fogarty, Forcible Rape: Bibliography, 65 Journal of Criminal Law and Criminology, 248 (1974).

CHILD WITNESSES

Though children may be sworn as witnesses their testimony is viewed with such caution that the trial judge may be required to give a warning with respect to such a testimony, similar to the warning given about the testimony of accomplices. *Horsburgh v. The Queen,* [1967] S.C.R. 746. The rationale for such a warning was given in *Kendall v. The Queen* [1962] S.C.R. 469:

> The basis for the rule of practice which requires the judge to warn the jury of the danger of convicting on the evidence of a child, even when sworn as a witness, is the mental immaturity of the child. The difficulty is fourfold: 1. His capacity of observation. 2. His capacity of recollection. 3. His capacity to understand questions put and frame intelligent answers. 4. His moral responsibility.

Besides the cautionary warning respecting children who testify under oath certain statutory provisions provide that the evidence of an unsworn child cannot support a conviction unless such evidence is corroborated. Criminal Code, R.S.C. 1970, c. C-34, s. 586; *Juvenile Delinquents Act,* R.S.C. 1970, c. J-3, s. 19; *Evidence Act,* R.S.C. 1970, c. E-10, s. 16(2).

The different treatment afforded children who qualify to take the oath and those who give unsworn testimony is hard to justify. The dangers inherent in the testimony of children result largely from nondeliberate distortion in their perception, memory and narration. Even the assumption that a child who does not understand the nature of the oath is more prone to tell deliberate lies than one who does is questionable. However we would go further than simply requiring for instance a mandatory caution for the testimony of all children, sworn and unsworn. We recommend that even such a caution no longer be a mandatory requirement. In some situations children make excellent witnesses—they are close observers, and most if not all people are familiar with the danger that children are easily led by suggestion and because of their great imaginations, sometimes fantasize stories. There is certainly no evidence that jurors are likely to be misled by the testimony of children. However as mentioned in an earlier study paper, Study Paper #1, Competence and Compellability, the Law Reform Commission is currently sponsoring a study on the evidence of children generally. Obviously, in our recommendations to the Commission we will consider not only the responses we receive to this paper, but also the results of that empirical study.

PERJURY

Perjury is one of the few offences that requires corroboration. Criminal Code, R.S.C. 1970, c. C-34, s. 123. The history of this requirement, that something more than the testimony of a single witness is necessary to convict an accused of perjury, is fully explored in 7 Wigmore, Evidence sec. 2040 (3d. ed., 1940). Briefly, the explanation resides in the fact that the crime of perjury was dealt with originally almost exclusively in the Court of Star Chamber. The procedure in the Court of Star Chamber followed the ecclesiastical or civil law approach. That approach, in force on the Continent until the time of Napoleon, was based on a numerical system of proof. Normally, a single witness would not be sufficient to establish a fact and the weight of a particular person's testimony, depending on the dispute, was assigned a numerical value, sometimes in fractions. It is not surprising then that the Court of Star Chamber demanded two witnesses for the crime of perjury. With the abolition of the Star Chamber and the transfer of its jurisdiction to the Court of King's Bench the long established practice of requiring two witnesses in perjury prosecutions was accepted in the common law courts despite those courts' clear general rejection in the 17th century of the ecclesiastical numerical system. The common law acceptance of this apparent anomalous exception was explained by Wigmore on the basis that the crime of perjury was the one crime where a quantitative theory had some logical base at the time it was adopted. In this period of development in the law of evidence a person accused of a crime was not permitted to testify. Thus in most criminal cases the oath taken by a witness for the prosecution was unopposed by the defence. But in a charge for perjury the accused had previously given evidence under oath, thus in such cases it was often "oath against oath". The common law at this time although it had not adopted the numerical system, gave great reverence to the taking of an oath. So, Wigmore contends, it was perhaps not unsurprising that the common law retained the requirement of two oaths, or two witnesses, for the prosecution of perjury.

The historical reason for requiring corroboration in cases of perjury has disappeared. However, the requirement is now defended for a different reason. It is contended that if the requirement is abolished it would have the effect of discouraging persons from giving evidence in court. A potential witness might fear that he would be unduly harassed by a charge of perjury brought by an unsuccessful party, and that in a subsequent prosecution for perjury it would be simply his testimony against his prosecutor's. However, eliminating the corroboration requirement does not make the prosecution's task any easier than a prosecution for any other serious crime such as murder or robbery; the trier of fact must still be satisfied of guilt beyond a reasonable doubt. Moreover, if the removal of the corroboration requirement better enables the prosecution of false witnesses and thus "discourages persons from giving (false) evidence" then the purpose of having a crime called perjury is fulfilled.

TREASON

Treason is another offence that requires corroboration. Criminal Code, R.S.C. 1970, c. C-34, s. 47(2). The English rule was not judicially fashioned but was enacted by statute in 1547. 7 Wigmore, Evidence sec. 2036 (3d. ed., 1940).

Blackstone expressed the following reason for the rule:

> to secure the subject from being sacrificed to fictitious conspiracies, which have been the engines of profligate and crafty politicians in all ages.

Wigmore elaborated on this policy reason:

> The true solution seems to depend on the relative proportion, in experience, of two elements, namely, the likelihood of false accusations, as compared with the harm of a guilty person's escape. When the former is large, and the latter is small, then the two-witness rule may be justified as being often effective, and seldom harmful when not effective. Now for treason this relation does seem to exist. In times of bitter political division, the dominant political party has the strongest motive and the amplest means of securing false testimony, to rid itself of its opponents; while the harm of a real traitor escaping judicial punishment is relatively small, because treason, when it is confined to a few individuals, can never really endanger the state, and, when it represents a wide-spread opinion in the community, there will be ample array of witnesses to prove its acts. The rule of two witnesses, then, seems to rest on justifiable grounds of policy.
>
> 7 Wigmore, Evidence sec. 2037 (3d. ed., 1940).

It is anomalous that while corroboration is required for treason it is not required for any other offences against national security. We tend to agree with the English Criminal Law Revision Committee (11th Report, supra, para. 195) who said that they could determine no possible reason to continue the requirement of corrobotation in the English Treason Act. If the Government is ever as bent on convicting a person of treason as Wigmore hypothesized, the corroboration requirement will be of no protection to the accused.

FORGERY

Forgery is the final offence for which corroboration is required. Criminal Code, R.S.C. 1970, c. C-34, s. 325(1). The requirement is even more anomalous for this offence than it is for the preceding two offences.

The section in our criminal code requiring corroboration for forgery was originally taken from section 54 of the Forgery Act, (1869) 32-33 Vict. Ch. 19. To understand the passage of the English provision it is necessary to recall that until the middle of the 19th century, persons interested in the outcome of litigation were considered too untrustworthy, because of their interest in the outcome of the action, to testify. The Evidence Act of the Province of Canada (1852) 16 Vict. Ch. 19, s. 1, provided that thereafter persons interested in the matter in question could testify but maintained the prohibitions respecting the parties to the litigation. The ability of parties to testify did not exist until 1869. The Evidence Act, S.O. 33 Vict. Ch. 13. Section 54 of the Forgery Act of 1869 then is seen as one of the first pieces of legislation permitting interested persons to testify, with their interest left to affect the weight of their testimony rather than to operate as a complete bar. The proviso within s. 54 requiring corroboration should be viewed therefore as exhibiting the caution with which the legislators were then making this reform. It is important to note that the requirement of corroboration in section 54 of the English Act only applied with respect to the testimony of interested persons. With the enactment of the Criminal Code in 1892 the reason for the initial proviso appears to be forgotten and we find corroboration required for a conviction of forgery regardless of the character of the witness. Since we no longer reject witnesses as incompetent because of interest, the original reason for the corroboration requirement in forgery cases is gone. Its retention is impossible to justify in the absence of such a requirement with respect to other serious crimes in the Criminal Code.

In conclusion we note that the weight to be given to evidence must depend upon quality not pre-determined quantity; that there is no evidence to suggest that juries are less capable of weighing this kind of evidence than any other kind; that appellate review for the sufficiency of evidence, and the necessity of proof beyond a reasonable doubt are the ultimate protections for the innocent; and that the abolition of these rigid and complicated rules will in no way infringe upon counsel and the judge's right to give a caution to the jury appropriate to the circumstances of each individual case.

LAW REFORM COMMISSION

COMMISSION DE RÉFORME DU DROIT

EVIDENCE

12. PROFESSIONAL PRIVILEGES BEFORE THE COURTS

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130 Albert Street
Ottawa, Canada
K1A 0L6

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INTRODUCTION

Legislation regulating wiretapping[1] and recent studies of computers and data banks[2] are evidence of a growing concern over intrusions upon the privacy of Canadians. One cannot help but fear a society in which the State would exercise constant control and supervision over all activity. Thus, there exists the notion of a right to secrecy, a right to which each individual would be entitled which would protect a certain core area of individual privacy.

Perhaps the best known judicial manifestation of this right of secrecy is what jurists call "*privileged communications*". This expression refers to the exceptions to the legal rule which says that all competent witnesses must testify in court. It authorizes these witnesses to not divulge confidences received from someone else. The law gives priority to the respect of confidence over the search for the full and complete discovery of judicial truth. Although professional secrecy is not historically linked to rights of privacy, there nevertheless exists an obvious relationship between them.

The expression "*privileged communications*", is ambiguous. Under Anglo-American common law, it refers to the set of rules governing "privileges". The word "privileged" itself is confusing even though it generally relates to "*exemptions*" from testifying. In the law of evidence, a certain number of "privileges" relate to instances when, in order to promote a professional or personal relationship between two persons, the law grants a right to secrecy before the courts by exempting them from divulging confidential facts. Examples of such are the husband and wife privilege and the attorney-client privilege. Other "privileges" are created in order to protect the individual in one of his fundamental rights. The right not to be compelled to give evidence against oneself, except in specific cases provided by law, is thus known as the "privilege" against self-incrimination. Finally, other "privileges" focus on the protection of state, political or social interests, by preventing the public disclosure of certain information during the course of legal proceedings. Examples of such privileges are the Crown "privilege" (State secret) and the non-disclosure of the names of informers. Protection of journalists' sources also belong to this group.

This looseness in terminology may lead to the confusion of various situations which have but one common characteristic—the general acknowledgement of a right or obligation to silence. Thus, the privilege of journalists, which is not recognized by Canadian courts[3], is often compared by the public to that of the attorney, although

the former does not constitute true "professional privilege" in the classical sense of the word, but rather a right not to divulge a source of information in order to avoid being considered as a public informer. Journalists do not receive confidences in order to provide professional assistance to the persons who confide in them. Furthermore, whereas the identity of the persons who communicate in confidence with attorneys can generally be ascertained but not the content of such communications, the situation is exactly reversed with regard to journalists, since the information is made public, but not the identity of the persons who supplied it.

This study paper will limit itself to examining the first category of previously mentioned "privileges", with the exception, however, of the marital privilege which has already been considered to some extent by the Evidence Project[4].

The right to refuse to testify in court is but one of the legal manifestations that protect professional confidences. The code of ethics of most organized professions impose on members the obligation to respect confidences received by them in their professional capacity. Inappropriate disclosures detrimental to the client are subject to civil and disciplinary sanctions. Yet, under present Canadian federal law, this obligation yields when the confidant is called upon to testify in court. Except in the case of attorneys, no other professional "privilege" is recognized among those which are created for the purpose of promoting a professional relationship. For example, a doctor called as a witness in a judicial proceeding must, in principle, answer all the questions put to him, even though his answers may divulge confidential information confided to him by his patient. The admission of a right of secrecy in relations with the public in general, therefore, is not necessarily tied up with the respect or recognition of this right before a court of justice. The fact that the civil law and medical ethics impose an obligation to silence does not mean that our federal Parliament must automatically sanction it before the courts. The basic philosophies underlying these two levels of recognition are different and can hardly be compared.

The failure to recognize a right to secrecy in court is significant. On the judicial level, precedence is given to a free search for judicial truth, over the respect of confidences. This position is even more important for many professional groups who consider the recognition of a right to secrecy as a symbol of professional status. The granting of a privilege in court enhances the profession's position in society. It emphasizes the importance given to it by the legislator. The issue is therefore important—especially for a certain number of newly formed professions which seek greater recognition of their position in Canadian society.

This document is essentially a document for consideration and reflection. We will begin with a brief reminder of the present state of Canadian law and compare that with other judicial systems. We will then attempt to clarify the principles that underly the recognition of the right of professional secrecy, leading to comments and suggestions on the course that the reform of Canadian law should take in the future.

I. THE PRESENT STATE OF CANADIAN LAW

Canadian federal law follows the tradition of British common law in matters of professional privilege. Only the attorney-client relationship is protected in court. Neither doctors, psychoanalysts, nor religious confidants may claim professional privilege and thereby refuse to give testimony on a pertinent fact in litigation. Various historical reasons are behind this position. We refer the reader to studies made on this subject[5].

However, within the limits of their legislative jurisdiction, certain provinces have extended the protection of professional privilege to other categories of confidants. Thus, Newfoundland recognizes such a right to religious advisers[6]. Quebec gives the most extensive protection. Indeed, the Code of Civil Procedure of Quebec[7] grants a privilege to clergymen, lawyers, notaries, physicians and dentists[8].

The recognition in common law of the lawyer's professional secrecy, to the exclusion of all other professions, is sometimes looked upon by the public as a discriminatory measure, somewhat of a "privilege", advantage or favour which the jurists have granted themselves. Furthermore, the attorney's privilege is sometimes misunderstood by the public which often wrongly believes it to be absolute.

The principle traditionally invoked to justify the recognition of a right to privilege by a specific profession, is the desire to foster a particular type of professional relationship. Wigmore[9] sets four requirements for the establishment of a professional privilege:

(1) The communications must originate in confidence that they will not be disclosed;

(2) This element of confidentiality must be essential to the full and satisfactory maintenance of the relationship between the parties;

(3) The relationship must be one which in the opinion of the community ought to be sedulously fostered; and

(4) The injury that would inure to the relation by the disclosure of a communication must be greater than the benefit thereby gained for the correct disposal of litigation.

If the criteria proposed by Wigmore are applied to the medical profession, and compared with the legal profession, two logical conclusions may be reached: that the medical profession, like the legal profession, meets the set requirements, or,

alternatively, that the legal profession does not fulfill these requirements better than does the medical profession. One could thus conclude that the medical profession should enjoy the same protection as the legal profession or, alternatively, that the legal profession should no longer be entitled to professional privilege. Yet, the legal profession is a special case, distinct from all the other professions because of the very nature of the lawyer's role. A lawyer is not merely a professional among others. In addition to being his client's *alter ego*, he is also an auxiliary of justice and, as such actively participates in its administration. In our present judicial system the lawyer is as indispensable as the judge or jury. To oblige him to reveal in court what his client has revealed to him in all confidence for the purpose of defending his interest, is to interfere with the healthy and equitable administration of justice, irrespective of the effects upon the profession itself and upon its social image.

How is a lawyer to fulfill the role assigned by the judicial system if the existence of the professional relationship to protect the client in the defense of his rights is promoted on the one hand, and, on the other hand, if the disclosures made to him for the very purpose of carrying out such a task may be used against that client? In criminal law, the fundamental right of the accused to a full and complete defence would become illusory if his legal representative could, during the trial, be compelled to testify on the disclosures made to him by his client for the defence of his rights. The abolition of the privilege would transform the lawyer into an informer and since he is only his client's spokesman by way of representation, it would directly infringe upon the fundamental right of a citizen not to incriminate himself and not to be obliged to supply the prosecution with evidence that may be used against him. With respect to civil law, the abolition of the privilege would warrant a complete re-examination of the concept of representation by counsel. As in criminal law, the lawyer plays a representative role in civil trials. The adversary system, in which each litigant conducts his own case, presents his evidence and in which the judge merely acts as a referee, would disappear to make way to a veritable inquisition. In other words, to abolish the privilege of the legal adviser would question not only the lawyer's role, but also the whole fundamental principles governing our present system of administration of justice.

In contrast, the non-recognition of a privilege for the medical profession may have unfortunate effects upon its social image, may be very unfair, even prejudicial to the client's interests, but does not interfere per se with the administration of justice itself.

The lawyer's privilege is not absolute. It is subject to strict limitations, drawn from common law, and which can be summarized as follows:

(1) *The privilege exists only when the holder of this right, namely the client, does not exempt the lawyer from observing it:*

The privilege belongs to the client and not the lawyer. This rule is followed for all other professions in jurisdictions which extend the privilege protection to other than legal counsel. The only exception, in certain cases, is the religious confidant[10].

The privilege is granted to protect the interests of the client and not those of the professional. The client, therefore, controls it, and since it is not of public order, he alone has the opportunity of renouncing that right. The waiver results from an express or tacit act of will by the holder of the privilege, conscious of its existence, which establishes, without any doubt, an intention to renounce it. Numerous examples of these rules can be found in case law[11].

(2) *The privilege is not recognized when the relationship is carried with the aim of facilitating the commission of a crime or the perpetration of a fraud:*

When a person consults a lawyer to obtain information with the intention of committing a crime or offence, the privilege can no longer be recognized. Here, the privilege granted would completely detract from the aim. An English court[12] has held that a lawyer is bound to testify even though he was completely unaware of his client's illegal plans at the time of consultation[13]. There the attorney was obliged to clarify through testimony, certain facts surrounding the drawing up of a fradulent bill of sale. However, *prima facie* evidence of the conditions under which this exceptional rule is applied must be established in order to remove the right to remain silent.

(3) *The privilege may only be claimed for confidential communications made within the framework of the practice of the legal profession:*

Only those verbal or written communications made in confidence by the client for the purpose of obtaining an opinion or professional advice from his legal counsel, are protected. Communications of a non-confidential nature are not subject to the privilege, even though one may rightly presume from prevailing case law that any communication made to a lawyer is, in principle, of a confidential nature and made for the purpose of obtaining legal advice[14].

Secondly, it is no longer necessary, as was the case under the old common law, that the confidence be made with respect to or with a view of litigation[15]. True legal consultation is required, however. Therefore, when the attorney is acting as business adviser, it seems that the information disclosed for the purpose of obtaining such advice cannot benefit from the protection of the privilege[16].

Thirdly, certain cases have decided that protection applied only to the facts revealed by the client and not to those which the attorney established by himself, even though he would not have been able to do so except for the client-attorney relationship.

In our opinion, the logic of this last rule seems weak. Indeed, if the purpose of the privilege is to protect a professional relationship, it seems somewhat pedantic to make a distinction between those facts that are revealed and those that are established. In the exercise of the medical profession, for example, professional advice is the result of the information revealed by the patient as well as the findings of the doctor in his examination of the patient. Furthermore, is it not artificial to

limit the protection of communication to the facts that have been disclosed when the professional relationship itself is the result of a series of exchanges and discussions between the professional and the confidant?

Finally, it is important to note, that the fact that certain communications are privileged does not prevent one of the parties from establishing these facts by other means, by way of extrinsic evidence.

Canadian federal law therefore only recognizes, before the courts, the privilege of legal advisers. However, this right is limited. It is not absolute and can only be claimed by the client when each and all of the conditions set by the case law for its exercise are met. Certain judgements have sometimes suggested that the judge has discretion to grant the protection of the privilege in other cases. Thus, in *Dembie* v. *Dembie*[17], the court maintained a psychiatrist's objection to give testimony in a case of marital dispute. However, we find it difficult to consider that this ruling is a true reflection of the present state of the law.

II. ELEMENTS OF COMPARATIVE LAW

The legal outlook on professional privileges varies greatly from country to country[18]. A detailed examination of the law of the various legal systems would be too lengthy here. However, in order to offer contrast and comparison with Canadian law, we have considered two examples on which brief comments will be made, namely French law because it offers a striking contrast to Canadian law, and American law because it evolved differently from Canadian law in spite of a common legal tradition.

A. FRENCH LAW

French law[19] has traditionally shown great respect for the confidential nature of the disclosures made by a client to a professional. The obligation of professional secrecy is a matter of public order in France. Article 378 of the French Criminal Code[20], which served as an example and model to certain European legislations, such as Belgian[21] and Luxemburg[22] laws, punishes with a prison sentence of 1 to 6 months and a fine of 500 to 3000 francs any person who, having received confidences "... by reason of his position or profession or by temporary or permanent function ...", divulges such confidences. French law thus imposes an obligation of silence on physicians, surgeons, health officers, midwives, pharmacists, all specifically listed in article 378 of the Criminal Code, and also through judicial interpretation, on lawyers, solicitors, notaries, magistrates, religious advisers, brokers, stock-brokers, etc. . .[23].

The French courts deal severely with those who contravene the rule of absolute respect of confidences. The *Watelet* case[24] is one extreme example of this phenomenon. A French newspaper had inferred, in an article devoted to the death of painter Lepage, that his death had been caused by a venereal disease. In order to defend the public image of his patient, the physician who had treated him subsequently published a letter in the same newspaper explaining that the painter had died from cancer. Tried in criminal court, the physician was convicted pursuant to article 378.

Professional secrecy is therefore absolute under French law. The patient or client does not have the power to exempt the professional from its observation. It is based on public order and sanctioned not only by disciplinary or civil rules but also by penal rules. Traditional French society has always shown great respect for organized

professions and concern for promoting professional relationships. The fact that French criminal procedure is inquisitorial is perhaps another factor which may explain the position of French law. However, as several modern authors have pointed out[25], French law has repeatedly made legislative exceptions to the absolutist character of professional secrecy since the beginning of the XXth century. Some have even maintained that, because of various interpretations in judgements rendered in this respect, French case law is drifting towards an attenuation of professional secrecy based on a standard of relative social interest[26].

The French professional is therefore bound to absolute silence before the courts when the case does not come in one of the exceptions expressly provided for by legislation. Professional secrecy being a matter of public order and its violation constituting a criminal offence, the court is bound ex officio to make up for the lack of objection on the part of the witness. As one can see, French law is diametrically opposed to the common law on this point.

B. AMERICAN LAW

In the United States, the protection of professional privileges before the courts varies greatly from State to State. American law has adopted the rules of English common law in respect to the attorney-client privilege. It clearly separated from the latter, however, by passing legislation extending the privilege to other professions. Thus, most American States recognize medical privilege[27]. The State of New York seems to have been the first to sanction it as early as 1828[28]. A number of state legislations grant protection to religious advisers, others to psychologists, psychoanalysts, etc.[29].

There is no doubt that, American law favours an extension of the law of privileges. The "*Uniform Rules of Evidence*"[30] and the "*Model Code of Evidence*"[31] formally recognize the privilege of religious advisers, legal and medical advisers. More recently, the "*Proposed Federal Rules of Evidence*" suggested a codification of the privilege in favour of lawyers, psychotherapists and religious advisers[32].

In opposition to French law, however, the privilege is not established as an absolute right by the American legal tradition. Its exercise is also subject to a series of conditions and limitations which are similar to those associated with the attorney-client privilege in traditional common law. American law, however, makes a direct connection between the respect of professional secrecy and the respect of privacy.

Whatever the country, the problem raised by professional privileges in court always gives rise to the classic dilemma of the law of evidence. Must precedence be given to the free search and discovery of truth by recognizing few or no exemptions from testifying? Or, must this search be voluntarily restricted in the name of values

considered socially superior? The law of evidence has a number of rules whose aim is to exclude from the judicial debate evidence considered to be irrelevant or untrustworthy. However, as opposed to the other exclusionary rules (hearsay, opinion, etc. . .), the rule concerning privileges has the effect of eliminating evidence that is generally relevant, reliable and often likely to have a decisive impact on the case. Justice is therefore voluntarily depriving itself of quality evidence. The relevance and reliability of such evidence cannot generally be doubted since the disclosure of the confidential facts to the adviser is generally free and spontaneous and is not subject to an extrinsic constraint that could affect the credibility of its content.

III. PROSPECTS OF LEGISLATIVE REFORM

There are several possible legislative policies. The possibilities are extensive and range from the complete abolition of all privileges to the full recognition of legal protection for all confidential relationships; including intermediary solutions giving more importance to the freedom of evidence on the one hand or to the protection of individual rights on the other.

The complete abolition of professional privileges would mean the abolition of the client-attorney privilege under Canadian law. The law would thus break with a time-honoured tradition of common law, by placing all professions on a strictly equal footing and not creating privileges for any particular type of professional relationship. Such a solution seems unrealistic. In addition to making representation by legal counsel[33] and the present form of judicial administration practically impossible, it would eliminate a tradition based on long experience. Also, this solution would be unique in the western legal tradition, except perhaps under socialist regimes. To abolish the privilege of legal advisers would require the re-examination and total reformulation of the attorney's role in society.

At the other extreme, the legislator could consider "*deprofessionalization*" of the right of secrecy and protect confidences each time the person who confided reasonably expected confidentiality. In other words, the recognition of the privilege would no longer be necessarily connected with a professional relationship as such. In this perspective, the right to secrecy would apply to a much wider range of human relationships. It would no longer be theoretically based on the desire to promote a particular professional relationship, but on the intention to better respect a certain right to privacy. Protection would not relate to an objective typology of human relations (doctor-patient, attorney-client, etc. . . .) but to the confidential nature of the communication as subjectively perceived by the person who confided. This solution is attractive for several reasons. From the judicial viewpoint, the third classical criterion set forth by Wigmore[34] would not have to be applied, thus avoiding to make a value judgment on the social usefulness of a particular profession or of a particular type of confidence in relation to others. It would thus eliminate a selection based on a social perception of professions.

There are, however, two major obstacles to this solution. The first relates to the practical difficulties the application of this system would raise for the courts. Indeed, how are they to determine what is perceived as confidential by the person who confides? In a sense, at the extreme, everything could thus become

confidential. Whereas the existence of certain types of professional relationships at least allows the court to presume that the disclosure was made to the confidant with the reasonable expectation that the secret would be kept, total "deprofessionalization" of the right to secrecy eliminates this criterion and leaves the judge with vague and imprecise guidelines.

The second obstacle seems more significant. If everything revealed within the framework of a private relationship were to be considered as confidential, would this not constitute a serious obstruction of the administration of justice? Voluntary exclusion of relevant and reliable evidence likely to have a positive impact on the dispute is justified only when, in the long term, it serves to protect the interest of society more than the immediate discovery of the judicial truth. The general protection of privacy, aside from all other considerations, does not appear to be a determining factor considering the difficulties it would raise with respect to the administration of justice. In other words, not all confidential relationships should be protected before the courts but only those for which over and above the general motive of protection of privacy there exists specific imperatives.

A reasonable and rational solution cannot afford to be radical. It must take into account existing values and strive to reach a realistic and harmonious compromise between the respect of individual rights on the one hand, and the efficiency of the administration of justice on the other.

With the extreme solutions eliminated, two main avenues of reform appear possible. Based on the classical criteria of privilege recognition[35], the first consists of trying to identify, in the light of modern-day society, those professional activities deserving protection before the courts and to confer to them and to them only a privilege identical to that enjoyed by the legal profession.

The second solution, after legislative sanction of the rules developed for the attorney's privilege, would be to give the judge a discretionary power to recognize a privilege in other circumstances, without necessarily identifying them with a specific type of professional relationship, whenever he deems that a certain number of objective conditions have been met. In the hope of receiving comments we will discuss both of these approaches here.

A. RATIFICATION OF PRIVILEGE FOR OTHER PROFESSIONS

If one considers both the Canadian professional milieu, its development during the last few years, and the reasons used to justify the granting of a privilege to certain groups, at least two types of confidences reasonably warrant protection in court, namely confidences of a religious nature and confidences of a medical nature. Those follow from Wigmore's classical criteria.

Even authors who fiercely object to the extension of privileges support its recognition for religious confidences[36]. Wigmore, who favours no professional relationship other than that of attorney, concludes, after abundantly citing Bentham who himself is little inclined to favour the right to privileges, that:

> . . . on the whole then, this privilege has adequate grounds for recognition.[37]

Indeed, it appears to him that the relationship between the religious adviser and the individual who consults him meets the requirements of the four criteria. His main argument is that the prejudice that a forced disclosure could cause is more damaging than the benefit that the administration of justice can hope to derive from it.

There are also other important reasons for the recognition of a privilege to religious advisers. Freedom of worship and religion is one of the fundamental values of a democratic society which respects freedom of thought. Religious advisers are a moral guidance in the eyes of religious believers. Therefore, one may indeed wonder to what extent the respect of religious confidence is not an attribute of religious freedom.

On the other hand, the reasons justifying the non-recognition of a privilege for religious advisers under common law are mostly historical. The priest's right to secrecy seems to have existed in England prior to the Reformation[38]. It was then essentially related to the secrecy of confession. After the Reformation, only the Catholics or "papists" retained the sacrament of penance. The abolition of this right was thus a consequence of politically motivated religious intolerance towards the Catholic faith. In our country today, religious intolerance is a thing of the past. Freedom of religion is guaranteed by our political system and the motives for the abolition of the privilege in this particular case are not acceptable anymore. Indeed Canadian courts would seriously hesitate to hold in contempt of court a minister, priest or rabbi who would refuse to divulge during testimony any confidences made to them. Furthermore we find it hard to imagine that, in order to obtain conviction, the prosecution would, during trial call as a witness the priest who received the accused's confession. Finally, we must also consider that, in spite of a court order, a religious adviser who would feel it against his principles to testify could very well allow himself to be convicted. The effectiveness of the rule in such cases is therefore doubtful. There therefore normally should not be any hesitation to legislative protection. However, the recent surge of new sects, associations, groups or movements of religious or supposedly religious character would no doubt create problems of precise identification of religious confidences.

The problem is more complex with respect to the medical profession[39]. In the first place, medicine is no longer the exclusive domain of physicians. Psychologists and psychoanalysts sometimes exercise functions similar to those of psychiatrists. Chiropractors and kinesitherapists treat the same physical ailments as members of the medical profession.

Secondly, the practice of modern medicine in large urban centres and the specialization of the medical profession have resulted in a certain depersonalizing of the patient-doctor relationship. The case of the family doctor who knew all the secrets of the town in which he practiced is almost a thing of the past.

Thirdly, in contrast to certain European countries, Canadians seem less reluctant to a limited public disclosure of their illnesses. Modern methods of communication inform us of the state of health of public figures, sports or theatre stars, without outrageous reactions from those concerned. From the social-cultural standpoint, there seems to be a certain degree of tolerance towards the public disclosure of certain medical facts. Illness is not generally perceived as a social stigma except when by its very nature it is likely to expose the patient to humiliation, disgrace or social ostracism. Such is not the case, however, in certain areas of medicine, especially in those dealing with mental and emotional health. The progress of techniques of the psychoanalytical sciences in our society are important[40]. One cannot seriously contest that the treatment of emotional and mental illnesses requires the establishment of an absolute atmosphere of confidence between the patient and the psychotherapist. The patient, who wishes to solve his problems by seeking cure or relief, must confide in all honesty and without reticence in the person who is treating him. Therapy would be thwarted if the patient did not believe from the very beginning that his disclosures would remain confidential. The patient would surely deem it grossly unfair if his psychotherapist were to be compelled to testify on confidential matters during legal proceedings. One can also conceive the dilemma faced by professionals under the present law.

One argument often advanced against the extension of the privilege is the fact that many professions which have not yet benefited from the right to secrecy have nevertheless developed and expanded. In other words, it is argued that the absence of privilege recognition in the case of psychotherapy has not stopped Canadians from consulting psychiatrists, psychologists and psychoanalysts. This argument, developed by Wigmore, is specious. It is suggested that the reason why a citizen continues to consult a psychotherapist, even when he knows that his confidential disclosures may eventually be divulged in a court of justice, are twofold. He is simply unaware of the state of the law on the matter or the need for consultation is pressing and stronger than the risk he is taking and he is thus simply forced to choose the lesser of two evils. Furthermore, in many cases, patients do consider public disclosure as a remote possibility. Some patients may also feel that the professionals would prefer to respect the confidence and would be ready to accept possible conviction for refusing to testify.

On the other hand, an important sociological factor must also be considered. The Canadian judicial system has built in enough self-restraint to avoid blunt confrontations in this regard. Present Canadian law does not prevent the police from allowing a Catholic suspect to confess to a priest and then summoning the latter as a witness! [41] Crown prosecutors do not resort to such methods and therefore, even

though no other privilege than that of the attorney is recognized, they seldom take advantage of the powers given to them by law, to summon confidants as witnesses. When this happens, however, as has sometimes been the case with social workers, the public reaction is vigorous and respect for justice in the eyes of the public is probably not enhanced. It should be noted that the exact role of certain social workers, such as probation officers, is somewhat confusing. Indeed, probation officers are not necessarily confidants but rather officers of the court who replace the judge in supervising the execution of the sentence.

These few observations lead to a question of a more general nature. Is it legitimate and fair, in our present society, to use the physical, mental or emotional state of a person as evidence against that person? Is it not somewhat inconsistent for society, which sees to the physical and mental well-being of all citizens by encouraging access to various therapies, to use against them the confidences made in seeking such well-being? Save the case of expert testimony and the case where, the individual having been found guilty, these facts are necessary to arrive at a fair and just sentence, is it not abnormal for justice to use physicians and psychotherapists in the same way as a common police informer?

However, the recognition of a professional privilege to the medical profession raises difficulties inherent with the very nature of that profession.

Should the law make a distinction between physical ailments and those of a mental or emotional nature? In our opinion, it is accurate to believe that confidentiality is, at the outset, more important in certain areas of medicine than others, for example, in psychiatry more than in surgery. In the first case, the professional called to testify divulges private information freely revealed to him by his patient, whereas in the second case, the surgeon may be called to testify only on material facts which he has established himself and which are often of a less personal nature. The issue could be discussed at length, for there are numerous secondary hypotheses. Indeed, certain facts disclosed by a patient to a psychiatrist could be matters of common knowledge, whereas certain other facts confided by a patient to a surgeon could be strictly confidential. Several models of legislation, especially the "*Proposed Federal Rules of Evidence*", recognize the privilege of psychotherapists but not that of physicians in general[42]. The main difficulty raised by this limitation is the impossibility that very often exists of distinguishing the physical ailment from the mental one.

As in the case of all the other categories of confidants, the recognition of a privilege in this matter should be subject to strict limitations. All legislation provide exceptions to the rule, dictated by higher legal or social considerations, even those which, like French law, sanctions the absolute character of the privilege[43]. Thus, disclosures made by a patient to a doctor for the purpose of perpetrating a crime, fraud or offence, should not be protected. Such is the classical case of fraud or false statements in matters of life insurance. Furthermore, the law should sometimes compel a physician to depart from his obligation to keep silent when this is required

by the superior interest of society or of the group, even when the patient objects. Such is the case when a patient suffering from a contagious or a venereal disease refuses treatment, thus creating the risk of an epidemic[44], or when a patient suffers from an illness which makes driving a car a hazard to others.

The recognition of privilege does not mean absolute protection for all confidences, in all cases and under all circumstances. It would be advisable for the legislator to list the specific limitations of the privilege and to waive it when its application stands to create serious public danger, or threatens the life or security of individuals. This matter raises the difficult legal question of determining whether or not the right to the privilege is personal and extra-patrimonial. In other words, when the holder of the right dies or becomes incapable, should the privilege disappear or should the holder's heirs or legal representatives be allowed to continue to claim it? Opinions are divided on this question. The solution to this problem must take into consideration the interests at stake. Thus, in the case of medical privilege the health and general well-being of the patient are involved. There should therefore be no basic objection to the disappearance of the privilege after the patient's death. However, the client-attorney relationship can involve patrimonial rights as well as material and financial interests which are likely to be transmitted to the heirs. It would seem logical in this case to maintain the privilege and to allow those who are continuing the deceased's judicial personality to benefit from it.

B. RECOGNITION OF A DISCRETIONARY JUDICIAL POWER

There are a number of professions in Canada today, such as the accounting profession, which could also legitimately ask for the recognition of judicial protection of confidences[45]. However, the most typical example in this regard is perhaps that of social workers[46]. Some of them argue with reason, that the efficient exercise of their profession requires the promotion of a relationship based on mutual trust. Furthermore, there are certain cases where social workers carry out functions similar to those of psychotherapists (e.g., those working in prison environments in connection with the social or psychological re-adaptation of inmates).

In order to promote the exercise and development of certain professions deemed socially useful, and in order not to limit the obligation to silence to religious, legal and medical advisers, it is possible to conceive a more flexible system which would allow the judge to refuse to accept relevant evidence that results from a breach of confidence, when specific conditions are met and without the law establishing a specific list of privileged professional communications. The granting of a privilege in cases other than the legal profession would therefore be left to the court's discretion. Irrespective of its intrinsic merits, this system could only function rationally if the court were provided with guidelines. Firstly, the principle according to which the privilege protects the person confiding, and not the confidant,

should be maintained. Secondly, the privilege should only apply to the facts revealed to the confidant for the purpose of obtaining professional assistance. In other words, not all confidences must be protected, but only those disclosed for the very purpose of obtaining physical or moral assistance or guidance. A true professional relationship, established for the purpose of consultation, must exist. Finally, in addition to the classic exceptions involving the attorney-client privilege, the court before granting the privilege, should be convinced that, under the circumstances, disclosure would be more prejudicial than helpful to the administration of justice. In this respect, the burden of proof would thus rest on the person invoking the privilege.

This second solution has two main advantages. It eliminates having to decide, perhaps arbitrarily, on the comparative "merits" of the various professions, and it is sufficiently flexible to be considered as a long term reform. By not focusing on the existence of a particular professional relationship but rather by insisting on the values to be preserved the law would not limit the protection of privileges to a specific segment of society. Moreover, no single profession can be said to enjoy an absolute presumption as guardian of the values that the right to secrecy is made to sanction and protect. It would be up to future courts to establish a judicial policy in this regard. Some may object to this general solution on the grounds that the courts of common law countries have had a very conservative attitude towards privileges and that there would thus be a risk of missing the aims of a reform directed to an extension of privileges. A clear legislative drafting showing clearly the intentions of the reform would probably be sufficient to overcome this difficulty.

The various solutions presented in this paper will undoubtedly give rise to comments. The law could be formulated on the basis of the following rules:

(1) The legislative recognition of the attorney-client privilege, of its conditions and limitations;

(2) The granting of discretionary power to the courts in all other cases, when the courts believe that it would be unfair and inequitable to compel a witness to testify as to facts confided in him in the exercise of his profession and for the purpose of obtaining professional assistance, and that the prejudice caused by disclosure would be greater than the benefit which the administration of justice might derive from it.

Furthermore, in any case, whatever the scope of privileged recognition, it would be advisable, in our opinion, to specifically outline in the legislation the framework of the law of privileges and to express the following principles:

(1) The protection privileges relate, without exception, to all the confidential facts revealed or observed during the professional relationship;

(2) The privilege belongs under all circumstances to the person who confides. The latter can renounce or waive his right provided he does so voluntarily, being aware of the consequences; and

(3) The protection disappears in the case of fraud or where an exception to the general rule is specifically provided by legislation, for reasons of public interest.

REFERENCES

1. Art. 178 of the Criminal Code.
2. L'ordinateur et la vie privée, Ottawa, 1972.
3. See *Wismer Publishing* v. *MacLean Hunter Publications Ltd.* (1953) 4 D.L.R. 349 (Supreme Court of British Columbia), (1954) 1 D.L.R. 501, (1954) 4 D.L.R. 334 (Court of Appeal of British Columbia); *McCornacky* v. *Times Publishers Ltd.* (1964) 50 W.W.R. 389 (Court of Appeal of British Columbia). See also *Banks* v. *Globe and Mail* [1961] S.C.R. 874.
4. See "Study Paper of the Evidence Project", no. 1: Competence and Compellability. In the light of numerous comments received, the Evidence Task Force has somewhat changed its position on the matter.
5. See, especially: WIGMORE, "Evidence in Trials at Common Law" 1961, vol. 8, no. 2285 and ff., p. 527 and ff., and especially no. 2290, p. 542 and ff., no. 2380, p. 818 and ff.; CROSS, "Evidence" 1967, p. 243 and ff.; McCORMICK, "Evidence" (1960) 16 Tex. Law Rev. 447; HAMMELMAN, "Professional Privilege: a Comparative Study (1950) 28 C.B.R. 750; FREEDMAN, "Medical Privilege" (1954) 32 C.B.R. 1; NOKES, "Introduction to Evidence" 1967, p. 195 and ff.
6. Newfoundland Evidence Act, R.S. Nf. 1952, ch. 120, art. 6: "A clergyman or priest shall not be compellable to give evidence as to any confession made to him in his professional character".
7. Art. 308, C.C.P.: "Similarly, the following persons cannot be obliged to divulge what has been revealed to them confidentially by reason of their status or profession:
   1 – Priests or other ministers of religion;
   2 – Advocates, notaries, physicians and dentists; unless, in all cases, they are expressly or implicitly authorized by those who confided in them; . . . "
8. A Quebec judgment in 1965: *La Reine v. Sauvé* [1965] C.S. 129, comments (1965) 15 R. du B. 562, had nevertheless held that, with respect to criminal justice, the courts must refer to civil law and not common law in matters of professional privileges.
9. WIGMORE, *op. cit.*, no. 2285, p. 527.
10. This seems to be the interpretation to be given to article 308 of the Code of Civil Procedure of Quebec.
11. See *Howley* v. *R.* (1927) 1 S.C.R. 520; *Minter* v. *Priest* [1930] A.C. 558; *Smith* v. *Smith* [1958] O.W.N. 135 (Ontario High Court). Also: *Kulchan* v. *Marsh* (1950) 1 W.N.R. 272 (Saskatchewan Court of Appeal).
12. *R.* v. *Cox and Railton* (1884) 14 Q.B.D. 153.
13. On the application of these principles: *Bullivant* v. *A.G. Victoria* [1901] A.C. 196; *Gosselin* v. *R.* (1903) 31 S.C.R. 225; *R.* v. *Smith* (1914) 11 Cr. Ap. R. 229, p. 239 (Court of Criminal Appeal); *O'Rourke* v. *Darbishire* (1920) A.C. 581 (House of Lords); *R.* v. *Coffin* (1954) 19 C.R. 222, p. 227 (Quebec Court of Appeal); *R.* v. *Workman and Huculak* (1963) 1 C.C.C. 297 (Supreme Court of Alberta); *Goodman and Carr and M. of N. Revenue* (1968) 2 O.R. 814 (Ontario High Court).

14. *Minter* v. *Priest* [1930] A.C. 558 (House of Lords); See also *Hicks* v. *Rothermel* (1949) 2 W.W.R. 705 (Saskatchewan Court of Appeal); *Kulchar* v. *Marsh* (1950) 1 W.W.E. 272 (Saskatchewan Court of Appeal). Also *R.* v. *Bencardino* (1974) 2 O.R. 2nd 351.

15. On this subject see: *Minet* v. *Morgan* (1873) 8 Ch. App. 361 and the position adopted by the Royal Commission of Inquiry into Civil Rights of the Province of Ontario, Toronto, 1968, no. 1, vol. 2, p. 819.

16. *Canary* v. *Vested Estates* (1930) 3 D.L.R. 989 (Supreme Court of British Columbia), see also: *R.* v. *Macender* (1966) 1 C.C.C. 328, p. 338; *United States of America* v. *Mammoth Oil Co.* (1921) 2 D.L.R. 966 (Ontario Court of Appeal); MAUBER, "Privileged Communications and the Corporate Counsel" (1967) 28 Ala. Law Rev. 352.

17. Un-reported judgment of the Ontario High Court of April 6, 1963. See excerpts published in (1964) 7 Crim. Law Quart. 305, p. 316.

18. See: "Droit de la preuve et secret professionnel" in Travaux du 4ième Colloque international de droit comparé, Presses de l'Université d'Ottawa, 1967, p. 1 to 54; BOUZAT, "La protection juridique du secret professionnel en droit comparé" (1950) Rev. Sc. Crim. 541; HAMMELMAN, "Professional Privilege: a Comparative Study" (1950) 28 C.B.R. 750; BAUDOUIN, J.L., "Secret professionnel et droit au secret dans le droit de la preuve", Paris, Librairie Générale, 1965.

19. With respect to this matter under French law, in addition to the classical treatises on criminal law, see: Encyclopédie Dalloz, Droit Pénal, Tome III, verbo: Secret Professionnel; Jurisclasseur de droit pénal, verbo: Violation du secret professionnel; PERRAUD-CHARMANTIER, "Le secret professionnel, ses limites, ses abus", Paris, Librairie Générale, 1926; LEGENDRI, R., "Secret médical et monde contemporain", Paris, Foulon, 1955.

20. Art. 378 of the French Criminal Code: (translation) "Save the cases where the law compels them to act as informers, the physicians, surgeons and other health officers, as well as pharmacists, midwives and all other persons receiving confidences by reason of their status or profession or by reason of temporary or permanent function, who divulge such confidences, shall be punished with imprisonment of one month to six months and a fine of 500 francs to 3000 francs. However, the above-mentioned persons, without being bound to inform on abortions which they deem to be criminal and of which they became aware in the exercise of their profession, do not incur the penalties provided in the preceding paragraph if they do inform on such abortions; when summoned to testify in court in a case of abortion, they are free to testify without making themselves liable to any penalty. These persons do not incur the penalties provided in the first paragraph when they inform the medical or administrative authorities in charge of health and social proceedings of deprivation or cruelty inflicted upon minors under fifteen years of age, of which they became aware in the exercise of their profession. When summoned to testify in court in a case of ill-treatment or deprivation of such minors, they are free to testify without rendering themselves liable to any penalty".

21. Art. 458 of the Belgian Criminal Code.

22. Art. 458 of the Luxemburg Criminal Code.

23. In this respect, see: LEGEAIS, "La violation du secret professionnel" in Jurisclasseur de droit pénal, art. 378, no. 21 and ff.

24. Cass. Crim. 19-12-1885, D.P. 86-1-86.

25. See especially: LEGEAIS, *op. cit.* no. 17; ALMAZAC, R., "Les seules exceptions au principe du secret professionnel" Gaz. Pal. 1971 1. Doct. 113, REBOUL, "Cas limite du secret professionnel médical" J.C.P. 1950, Doct. 825.

26. See GULPHE, "Le secret professionnel en droit français", Rapport au Congrès de l'Association Henri Capitant, Beyrouth, 1974. Also LEGEAIS, *op. cit.* no. 17.

27. WIGMORE, *op. cit.* no. 2380, p. 818 and ff.

28. N.Y. Rev. Stat. (1828) ch. 7, art. 9, sec. 73.

29. WIGMORE, op. cit., no. 2286, p. 533, no. 2394, p. 869 and ff. See also the authors cited note 40.

30. Arts. 26, 27, 29 and 37.

31. Arts. 209, 213, 219, 220 to 223.

32. Art. V. Rules, 503, 504, 506. These rules have, however, been strongly criticized. See especially: KRATTENMAKER, "Testimonial Privileges in Federal Courts: An Alternative to the Proposed Federal Rules of Evidence" (1973) 62 Georgetown Law J. 61; ROTHSTEIN, "The Proposed Amendments to the Federal Rules of Evidence" (1973) 62 Georgetown Law J. 125.

33. See *supra.*

34. See *supra.*

35. See *supra.*

36. In this respect, see, among other works, NOKES, "Professional Privilege" (1950) 66 Law Q. Rev. 88; LABONTE, "Le secret de la confession devant les tribunaux", Ph.D. Thesis, University of Montreal, 1958; "Note on Privileged Communications to Clergymen" (1955) 1 Cath. Law Rev. 200; LYON, "Privileged Communications, Penitent and Priest" (1964) 7 Crim. Law Q. 327.

37. WIGMORE, *op. cit.*, no. 2396, p. 878.

38. See NOKES, *op. cit.*, p. 98 and ff.

39. With respect to medical profession, see, among other, DE WITT, "Privileged Communications between Physician and Patient", Springfield Thomas, 1958; FREEMAN, "Medical Privilege" (1954) 32 C.B.R. 1; BALDWIN, "Confidentiality between Physician and Patient" (1962) 22 Mod. Law Rev. 181; BROCK, "Medical Privileges" (1967) 36 Man. B. News 122; BAUDOUIN, J.L. "Le secret professionnel du médecin, son contenu, ses limites" (1963) 41 C.B.R. 491.

40. With respect to psychotherapists, see, among other, GUTTMACKER and WEIKOFEN, "Privileged Communications between Psychiatrist and Patient" (1952) 28 Ind. Law J. 32; SLOVENKO, "Psychiatry and a Second Look at the Medical Privilege" (1960) 6 Wayne L. Rev. 175; "Psychotherapy, Confidentiality and Privileged Communication", Springfield Thomas, 1965. FISHER, "The Psychotherapeutic Professions and the Law of Privileged Communications" (1964) 10 Wayne L. Rev. 609; LOUISELL and SINCLAIR, "Reflection and the Law of Privileged Communications: The Psychotherapist-Patient Privilege in Perspective" (1971) 59 Cal. Law Rev. 30; MALONEY, "Psychiatrist-Patient Communications in Canadian Courts" (1971) Mod. Med. 9; KENNEDY, "The Psychotherapist Privilege" (1971) 12 Wash. Law J. 296.

41. LYON, "Privileged Communications between Peritent and Priest" (1964) 7 Crim. Law Q. 327, p. 328.

42. Proposed Federal Rules of Evidence, art. V, rule 504.

43. See *supra*, works cited notes 19, 25 and 26 and LARGUIER, "Certificats médicaux et secret professionnel", Paris, Daloz, 1963.

44. This case is provided by Quebec legislation, "*Public Health Act*" R.S.Q., 1964, ch. 161, art. 70; "*Venereal Diseases Act*" R.S.Q., 1964, ch. 168, art. 3, 4, 12. See also "*Ontario Venereal Diseases Prevention Act*" R.S.O., 1960, ch. 415.

45. See "Privileged Communications: Accountants and Accounting" (1968) 66 Mich. L. Rev. 1264.

46. In this respect, see, KIRKPATRICK, "Privileged Communications in the Correction Services" (1964) 7 Crim. Law Quart. 305; BARNETT, and GRONEWOLD, "Confidentiality of the Presentence Report" (1962) 26 Fed. Prob. 26; "The Social Worker-Client Relationship and Privileged Communications (1955) Wash. U. Law Q. 362; LEBLANC, P., "Privileged Communications and the Counsellor" (1972) 7 McGill J. of Education 11.